TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 124

THE A. J. PHILLIPS COMPANY, PLAINTIFF IN ERROR,

vs.

GRAND TRUNK WESTERN RAILWAY CO. ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED MARCH 10, 1915.

(23,581)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1914.

a United States Circuit Court of Appeals, Sixth Circuit.

No. —.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,

vs.

GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

RECORD.

1 *Original Transcript of Record.*

Stipulation.

Filed in Clerk's Office March 3, 1911. Martin J. Cavanaugh, Clerk.

United States Circuit Court, Eastern District of Michigan, Southern Division.

No. 8654.

THE A. J. PHILLIPS COMPANY, Plaintiff,

vs.

GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, through their respective attorneys, that the record on appeal in this cause shall consist of the following:

(1) Only that part of the declaration that is attached hereto.

(2) The demurrer of the Grand Trunk Western Railway Co., filed in this cause (the demurrer of the Detroit, Grand Haven and Milwaukee Railway Company filed in this cause being exactly the same as the demurrer of the Grand Trunk Western Railway Company and omitted simply for the purpose of shortening the record).

(3) The motion to set aside service filed in this cause by the Illinois Central Railroad Company, also affidavit pertaining thereto and the return.

(4) Judgment sustaining demurrers and dismissing cause, peti-

tion for Writ of Error, Assignments of Error, Order allowing Writ of Error, and Citation.

CHOATE, WEBSTER, ROBERTSON & LEHMANN, *Attorneys for Plaintiff.*
L. C. STANLEY,
Attorney for Defendants, Grand Trunk Western Railway Co., Detroit, Grand Haven & Milwaukee Railway Co., and Illinois Central Railroad Company (Specially).

2 *Declaration.*

Filed in Clerk's Office May 11, 1909. E. W. Voorhies, Clerk.

In the United States Circuit Court in and for the Eastern District of the State of Michigan.

THE A. J. PHILLIPS COMPANY, a Corporation,
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY, a Corporation; Detroit, Grand Haven & Milwaukee Railway Company, a Corporation; Illinois Central Railroad Company, a Corporation; Southern Railway Company, a Corporation.

The A. J. Phillips Company, a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, by its attorneys, Choate, Webster, Robertson & Lehmann, complains of the Grand Trunk Western Railway Company, a corporation, the Detroit, Grand Haven & Milwaukee Railway Company, a corporation, Illinois Central Railway Company, a corporation, and the Southern Railway Company, a corporation, in a plea of trespass on the case, and says:

That on to-wit the fifteenth day of April, A. D. 1903, and ever since and for a long time before, the said plaintiff had its principal place of business at Fenton, in the State of Michigan; that on the said date and ever since and for a long time before, the said Plaintiff was and now is a citizen of the State of Michigan and a resident of the Eastern District of the State of Michigan.

That on to-wit the fifteenth day of April, A. D. 1903, and ever since, the said Plaintiff has been and now is engaged in the business of buying lumber and manufacturing door and window screens and other articles of commerce; and that in the pursuance of its business at the said time and ever since has been and now is a receiver and shipper of various commodities to and from various interstate points in and over the lines of the Defendants' railroads hereinafter stated.

That on or about, to-wit, the fifteenth day of April, A. D. 1903, the Grand Trunk Western Railway Company, the Detroit, Grand Haven & Milwaukee Railway Company, the Illinois Central Railroad Company and the Southern Railway Company were and ever since have been and now are railroad corporations, operating certain lines of railroads in the United States as common carriers, from the City of

Mobile, in the State of Alabama, to the City of Fenton, in
3 the State of Michigan, and were then and ever since said time have been and now are engaged in carrying interstate commerce along and over their said lines of railroad to the different states of the United States from the City of Mobile, in the State of Alabama, to the City of Fenton, in the State of Michigan.

That on a hearing before the Interstate Commerce Commission of the United States, the matter in question was submitted to said Commission to determine under the Interstate Commerce laws of the United States, enacted by Congress of the United States and in full force and effect at all the times herein stated, as to what was the reasonable freight rate per one hundred pounds on lumber to be charged by railroad companies engaged in carrying lumber as interstate commerce, in carloads, from points in lumber producing territories east of the Mississippi River and Louisiana, Mississippi and that part of Alabama including Mobile to Ohio River points as applied both to shipments locally to such Ohio River points and to shipments destined to points beyond said Ohio River, and on February 7th, 1905 (10, I. C. C., 505), the said Interstate Commerce Commission after a full hearing of the matter, determined and decided that the increase on April 15, 1903, of two cents per one hundred pounds in the rate on shipments of lumber in carloads from said points (which include Mobile, Alabama) to points on or north of the Ohio River (which include Fenton, Michigan), was unlawful, unreasonable and excessive to the extent of said two cents per one hundred pounds, and that said unreasonable rates when reduced two cents per one hundred pounds as in effect prior to said April 15th, 1903, was and is a reasonable rate to be charged by railroad companies engaged in carrying lumber as interstate commerce carriers over their lines of railroads, in carloads from points in the lumber producing territories east of the Mississippi River, in Louisiana, Mississippi and part of Alabama, including Mobile, to Ohio River points applied both to shipments locally to such Ohio River points and to shipments destined to points beyond said Ohio River, and said decision was submitted to the United States Circuit Court for the Eastern District of Louisiana and by said court affirmed, and said decision afterwards on appeal to the United States Circuit Court of Appeals was by that Court affirmed; and on appeal from that Court to the Supreme Court of the United States that Court on May 27, 1907, (See 206, U. S. 441) affirmed the decision of the said Circuit Court of Appeals.

That the defendant at the said time and prior to and ever since
4 well knew that the thirty cents per one hundred pounds was an unjust, excessive and unreasonable rate for carrying lumber over their said lines of railroad from the City of Mobile, in the State of Alabama, to the City of Fenton, in the State of Michigan; and that the said rate and freight charges were and are unjust, excessive and unreasonable by and to the extent of two cents per one hundred pounds.

For that on, to wit, the fifteenth day of July, A. D. 1904, the Plaintiff in the pursuance of its business had made them a carload

shipment of 33,800 pounds of lumber over the defendant's said lines of railroad from Mobile, in the State of Alabama, to Fenton, in the State of Michigan; and the defendants well knowing that such freight charges were unlawful, excessive, unjust and unreasonable, received said lumber at Mobile, in the State of Alabama, and carried the same over said lines of railroad to Fenton, in the State of Michigan; and thereon the, to-wit, 6th day of August, A. D. 1904, delivered the same to the Plaintiff and unlawfully, unjustly and wrongfully charged and collected from the Plaintiff for said shipment of lumber, thirty cents per one hundred pounds, including the illegal, unjust and excessive and unreasonable, two cents per one hundred pounds on said shipment from Mobile, in the State of Alabama, to the point of crossing on the Ohio River, so determined and decided by said Interstate Commerce Commission and said courts aforesaid, to be an unjust, unreasonable and excessive freight charge of two cents per one hundred pounds, to the damage of the Plaintiff Six 86/100 Dollars, and their costs, together with a reasonable attorney's fee to be assessed in the discretion of the Court and taxed as costs of suit.

For that also on the, to-wit, 15th day of July, A. D. 1904, and ever since the said plaintiff has been and now is engaged in the business of buying lumber and manufacturing door and window screens and other articles of commerce, and that in pursuance of its business at the same times and ever since that time has been and now is a receiver and shipper of various commodities to and from various points over the lines of the defendant's railroads hereinafter named.

That on or about the, to-wit, 15th day of July, A. D. 1904, the Detroit, Grand Haven & Milwaukee Railway Company, the Grand Trunk Western Railway Company, the Illinois Central Railroad Company and the Southern Railway Company were and ever since the said time have been and now are railroad corporations, operating certain lines of railroad in the United States as common carriers from the City of Mobile, in the State of Alabama, to the
5 City of Fenton, in the State of Michigan; and were and ever since that time have been and now are engaged in carrying interstate commerce along and over their said lines of railroad through the different states of the United States from the City of Mobile, in the State of Alabama, to the City of Fenton, in the State of Michigan.

That the Defendants as common carriers at said time and prior thereto and ever since well knew that twenty-eight (28) cents per one hundred pounds was the highest, just and reasonable freight rate that could be charged by the defendants as common carriers engaged in carrying lumber from Mobile, in the State of Alabama, to Fenton, in the State of Michigan; well knew that any higher freight rate charged on lumber would be illegal, unjust and excessive on such shipments. And on the date aforesaid and while the Plaintiff was engaged in the business aforesaid at Fenton, in the State of Michigan, it had [illegible] them a carload shipment of 33,800 pounds of lumber over to Defendant's lines of railroad and Defendants received the said lumber at Mobile, in the State of Alabama, and delivered the

same to the Plaintiff at Fenton, in the State of Michigan, and wrongfully and unjustly and contrary to the statute of the United States in such cases made and provided then in full force and effect, charged and collected from the Plaintiff two cents on each one hundred pounds so shipped and delivered in excess of the highest just and reasonable rate that defendants as common carriers of freight operating their lines of railroad under and by virtue of the interstate commerce law, might or could charge and collect to the damage of the Plaintiff in the sum of Six 88/100 Dollars.

(Then follows in the declaration 216 counts the same as the last four paragraphs, simply differing as to dates of shipment, dates of delivery, amount of shipment and amount of damages of the Plaintiff, the shipments running from April 29th, 1903, to August 15th, 1904, and the damages of the counts left out—totaling $1,808.65).

That the Defendants as common carriers at said times and prior thereto and ever since well knew that twenty-eight cents (28c.) per one hundred pounds was the highest, just and reasonable freight rate that could be charged by the Defendants, as common carriers engaged in carrying lumber from Mobile, in the State of Alabama, to Fenton, in the State of Michigan; well knew that any higher freight rate charged on lumber would be illegal, unjust and excessive, and yet, nevertheless, they refused to deliver each and everyone and all of the many aforesaid shipments of lumber to the said Plain-
6 tiff until they paid the said excessive rate, as aforesaid, and the Defendants although well knowing that the rate of thirty (30) cents per one hundred pounds, as aforesaid, on lumber from Mobile, Alabama, to Fenton, Michigan, was unjust and unreasonable and excessive to the extent of the said two cents per one hundred pounds as set forth in each of the aforementioned counts and each and all of them, and although said Defendants have often been requested to return the several aforesaid, unlawful charges and each and every one of them, yet, nevertheless, the Defendants have refused and do refuse to return all or any part of the aforesaid several overcharges all to the damage of the Plaintiffs in a sum of five thousand (5,000) dollars.

And by reason of the grievances aforesaid, each and every one of them, Plaintiff has been compelled to lay out and expend large sums of money, to-wit, One Thousand (1,000) Dollars, in the way of attorney's fees in and about and on account of the several wrongs and injuries aforesaid, each and all of them in the preparation of this suit, and will hereafter be compelled to pay, expend and lay out large sums of money, to-wit, One Thousand (1,000) Dollars, in the way of attorney's fees for prosecuting and conducting this case in Court.

That by reason of all of the grievances in the several counts heretofore set forth there has been great wrong and injury done by the Defendants to the Plaintiff all to the Plaintiff's damage in the sum of Five Thousand (5,000) Dollars, with their costs and a reasonable attorney's or solicitor's fee to be assessed in the discretion of the Court and taxed as costs of suit, and the Plaintiff, therefore, brings this suit.

THE A. J. PHILLIPS CO.,
By CHOATE, WEBSTER, ROBERTSON &

Demurrer.

Filed in Clerk's Office June 11, 1909. Martin J. Cavanaugh, Clerk.

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

7 THE A. J. PHILLIPS COMPANY, Plaintiff,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, and THE SOUTHERN RAILWAY COMPANY, Defendants.

STATE AND EASTERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

And the said Grand Trunk Western Railroad Company, Defendant in the above entitled action, by L. C. Stanley, its Attorney, appears specially and for the special and sole purpose of objecting to the jurisdiction of this Court by protestation until the question herein raised shall be decided, and not confessing or acknowledging all or any of the matters or things contained in the declaration in this cause to be true in the manner and form as they are therein set forth and alleged, does demur to the said declaration and for cause of demurrer shows:

1st. That it does not appear from the averments of said declaration or the matters charged therein that this Court has jurisdiction over said named Defendant.

2nd. That it does not appear upon the face of the said declaration that this Court has not jurisdiction over the said named Defendant.

3rd. The reason of the first two grounds of demurrer is that it appears by the said averments that the declaration charges illegal, unjust and unreasonable rates of freight in certain shipments of lumber out of the States of Alabama, Mississippi and Louisiana to Fenton in the State of Michigan, during various times between and in the year 1903 to the present time. That the said shipments were under the force and effect of the Act of Congress, called the Interstate Commerce Act, and various amendments thereto. It does not appear and is not alleged in said declaration that the Interstate Commerce Commission of the United States has ever passed upon the reasonableness, legality, justice, propriety or otherwise of the said rates of freight, nor has it made any order of reparation or payment in the premises.

4th. That it does not appear from said declaration that or whether the said Defendant above named is a citizen or resident of this or any other state or district, or that or whether the said Plaintiff is

8 a resident or citizen of this or any other state or district, and does not appear that they are citizens of different states. And

because it does not appear from said declaration that this suit is one arising under the laws of the United States, and that the controversy therein is of the sum or value of more than Two Thousand Dollars ($2,000), exclusive of interest and costs.

L. C. STANLEY,
Attorney for the Grand Trunk Western Railway Company.

Address: No. 17 Buhl Block, Detroit, Michigan.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

L. C. STANLEY.

STATE OF MICHIGAN,
County of Wayne, ss:

Geo. W. Alexander, being duly sworn, deposes and says that he is secretary of the above named Defendant, the Grand Trunk Western Railway Company, and is authorized to make this affidavit in its behalf; and further, that the foregoing demurrer is not interposed for delay.

GEO. W. ALEXANDER.

Subscribed and sworn to before me this 11th day of June, A. D. 1909.

HARRY H. WAIT,
Notary Public, Wayne County, Michigan.

My commission expires Dec. 3, 1909.

Motion.

Filed in Clerk's Office June 11, 1909. Martin J. Cavanaugh, Clerk.

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

THE A. J. PHILLIPS COMPANY, Plaintiff,
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND Haven & Milwaukee Railway Company, Illinois Central Railroad Company, and The Southern Railway Company, Defendants.

STATE AND EASTERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

9 Now comes the said Illinois Central Railroad Company, one of the defendants in the above entitled cause, by L. C. Stanley, its Attorney, appearing specially and only for the purpose of objecting to the jurisdiction of this Court over the said

named Defendant, and not appearing generally herein, and moves the Court to set aside the so-called service claimed to have been made upon Sweat, as an agent of the said company, and hold the same for naught and to dismiss this action as against said Defendant, the Illinois Central Railroad Company, for the following reasons, viz.:

1st. Because said defendant, the Illinois Central Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and having its principal office in the City of Chicago, and the State of Illinois, and is not a corporation of this State, and is not a citizen of this State, nor an inhabitant or resident of this State or District.

2nd. Because the said T. F. Sweat was not, when served, and is not a station agent or ticket agent of any station or depot along the line or at the end of the said named corporation railroad nor is he one of the principal officers or any officer of said named corporation.

3rd. Because said defendant, the Illinois Central Railroad Company, has no station nor line of railroad in this State or District.

4th. Because by the declaration in this cause the action appears to be and is stated to be an action for the recovery of an overcharge upon the rates of freight upon various shipments of lumber, such overcharge being alleged in said declaration to be an excessive charge, an unreasonable and illegal freight charge.

5th. That it appears from said declaration that said freight shipments were from a point in Alabama or Louisiana or Missouri to a point in Michigan, and therefore, interstate and were made in and since the year 1903, and therefore, come under the force and effect of Act of Congress, called the Interstate Commerce Act, and came under the force and effect of Section 16 of the same, as originally passed and as amended by the amendment of March 2nd, 1889, and as further amended by the amendment of June 29th, 1906. And it is not stated in said declaration that the question of the legality, reasonableness, justice or other propriety of said freight rates on said shipments were ever submitted to or passed upon by the Interstate Commerce Commission, as required by said Section 16 and other portions of said act and amendments, and it does not appear by said declaration that any order was made by said Interstate Commerce Commission, directed to said named Defendant, requiring it to make any reparation or payment to said plaintiff before commencing this suit. And the fact is that the said commission has not passed upon the propriety of said rates on said shipments and has not made any such order of reparation or payment.

This motion is based upon the declaration filed in the case and upon the proof of service of notice of the rule to plead and upon the affidavit of T. F. Sweat, filed herewith.

L. C. STANLEY,
Appearing Specially for the Illinois Central Railroad Company for the Purpose Above Mentioned and not Generally.

17 Buhl Blk., Detroit, Mich.

SIDNEY F. ANDREW,
Nashville, Tenn., Counsel.

Affidavit.

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

A. J. PHILLIPS COMPANY, Plaintiff,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND Haven & Milwaukee Railway Company, Illinois Central Railroad Company, and The Southern Railway Company, Defendants.

STATE AND DISTRICT OF MICHIGAN,
County of Wayne, ss:

Thacher F. Sweat, being duly sworn, deposes and says that a copy of declaration and notice of rule to plead was served upon him at Detroit, Michigan, on May 20th last, and that he is the T. F. Sweat upon whom the so-called return of service is made as regards the Illinois Central Railroad Company in this city. That deponent is employed by and knows the Illinois Central Railroad Company; the same is a corporation organized under the laws of Illinois, and having its principal office in Chicago, State of Illinois. That the said corporation has no principal office in this State or District,
11 and has no line of railroad nor any station agent or ticket agent at any station or depot along any line of railroad in this State, nor has it any conductor on any freight or passenger train in this State. That deponent is not any station agent or ticket agent at any station or depot along the line or at the end of the railroad of such corporation, nor is deponent a conductor of any freight or passenger train of said corporation, nor was he any of the foregoing on May 20th last, when so served. Nor was deponent then nor is he now any principal officer of said railroad corporation, but was and is a commercial agent, with the duties of soliciting and routing freight for the lines of said railroad corporation in other states. And further saith not.

(S'g'd) THACHER F. SWEAT.

Subscribed and sworn to before me, this 10th day of June, A. D. 1909.

J. J E. LINTON,
Notary Public, Wayne County, Michigan.

My commission expires Aug. 16/11.

Proof of Service.

Filed in Clerk's Office June 28, 1909. Martin J. Cavanaugh, Clerk.

United States Circuit Court, Eastern District of Michigan, Southern Division.

THE A. J. PHILLIPS CO., Plaintiff,
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY et al., Defendants.

STATE OF MICHIGAN,
County of Wayne, ss:

Clyde I. Webster, being duly sworn, deposes and says that on the 20th day of May, 1909, he served a true copy of the declaration filed in this cause with notice of rule to plead, etc., upon the Defendant, the Illinois Central Railroad Company, by serving personally, Mr. T. F. Sweat; at the office of the Illinois Central Railroad Company, in the Majestic Building, Detroit, Michigan, the commercial agent of said Illinois Central Railroad Company, in charge of the offices of the Illinois Central Railroad Company, in the Majestic Building, in the City of Detroit. Deponent further says that on, to-wit, May 17th, 1909, he served a true copy of said declaration and rule to plead, etc., upon Mr. L. C. Stanley, who accepted service of
12 the same for Defendants, Grand Trunk Western Railway Company, and Detroit, Grand Haven & Milwaukee Railway Company.

CLYDE I. WEBSTER.

Subscribed and sworn to before me this 28th day of June, A. D. 1909.

GEORGE A. KLEIN,
Notary Public, Wayne County, Mich.

My commission expires March 31st, 1913.

Judgment Sustaining Demurrers and Dismissing Suit.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court room, in the City of Detroit, in said District, on Monday, the nineteenth day of December, in the year one thousand nine hundred and ten.

Present: The Honorable Henry H. Swan, District Judge.

No. 8654.

THE A. J. PHILLIPS CO., Plaintiff,
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND Haven & Milwaukee Railway Company, Illinois Central Railroad Company, and Southern Railway Company, Defendants.

This cause having been heretofore duly argued and submitted to the Court upon the demurrers of the Detroit, Grand Haven & Milwaukee Railway Company and of the Grand Trunk Western Railway Company, and upon motion of the Illinois Central Railroad Company to dismiss said action, and due deliberation being thereupon had, it appearing to the Court that it is without jurisdiction, of said several causes, it is by the Court now here ordered, adjudged and decreed that said demurrers be and the same are hereby sustained, and the said motion granted, and the said action as against the Defendant Southern Railway company is dismissed for want of service of process on said company, and because of no appearance in behalf of said Southern Railway Company.

HENRY H. SWAN,
District Judge.

13 *Petition for Writ of Error.*

United States Circuit Court, Eastern District of Michigan, Southern Division.

No. 8654.

THE A. J. PHILLIPS COMPANY, Plaintiff,
vs.
GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants.

To the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

And now comes the Plaintiff herein, by Choate, Webster, Robertson & Lehmann, its Attorneys, and considering itself aggrieved by

the judgment heretofore entered, in the above entitled cause, petitions this Court for a Writ of Error, in order that the same may be corrected.

CHOATE, WEBSTER, ROBERTSON & LEHMANN, *Attorneys for Plaintiff.*

Filed March 3, 1911.

United States Circuit Court, Eastern District of Michigan, Southern Division.

No. 8654.

THE A. J. PHILLIPS COMPANY, Plaintiff,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND Haven & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants.

Assignments of Error.

The plaintiff, in this action, in connection with its petition for Writ of Error, makes the following Assignments of Error, which it avers occurred in the proceedings in this cause, to-wit:

(1) The Court erred in entering an order sustaining the demurrers of the Defendants Grand Trunk Western Railway Company and Detroit, Grand Haven & Milwaukee Railway Company.

14 (2) The Court erred in granting the motion of the defendant, Illinois Central Railroad Company, to set aside service upon it.

(3) The Court erred in entering an order dismissing this cause.

(4) The Court erred in not entering an order overruling the demurrers of the Defendants Grand Trunk Western Railway Company and Detroit, Grand Haven & Milwaukee Railway Company and compelling said Defendants to plead to Plaintiffs' declaration, and proceed to trial of said cause.

(5) The Court erred in not entering an order denying the motion of the Illinois Central Railway Company to set aside service upon it and in not compelling said Defendant to plead to Plaintiff's declaration and to proceed to trial of this cause.

(6) The Court erred in not holding that in proceedings under the Interstate Commerce Act it is not necessary to allege or to have diverse citizenship, but a suit can be brought in any United States Court where the defendant can be found.

(7) The Court erred in not holding that the service upon Mr. Sweat, the commercial agent of the Defendant Illinois Central Railroad Company was good service.

(8) The Court erred in not holding that the fifth paragraph of the motion of the Defendant Illinois Central Railroad Company was a plea to the merits, and prevented said Defendant from attacking the jurisdiction of the Court.

(9) The Court erred in not holding that suits brought under section 9 of the Interstate Commerce Act, as the case at bar, may be brought in any Court of competent jurisdiction, and that it is not necessary to allege diversity of citizenship in such cases, and that such suits do not have to be brought where the Defendant is an inhabitant, but may be brought in any district where the Defendant can be found.

(10) The Court erred in not holding that under Section 9 of the Interstate Commerce Act, that a person claiming to be damaged by any common carrier may either make complaint to the commission or may bring suit direct in any District or Circuit Court of the United States of competent jurisdiction.

(11) The Court erred in not holding that once there has been a determination by the Interstate Commerce Commission as to what is a reasonable freight rate on a certain commodity shipped from a certain locality to another certain locality, persons aggrieved by a freight rate in excess of the reasonable rate so determined by the Interstate Commerce Commission may proceed direct in a United States Circuit Court of competent jurisdiction without appearing before the Interstate Commerce Commission on shipments of this same commodity from the same locality to the same locality.

(12) The Court erred in not holding that inasmuch as the Interstate Commerce Commission has already determined that a freight rate of thirty cents per one hundred pounds for carrying lumber in carload lots from points including Mobile, Alabama, to points including Fenton, Michigan, is unjust, excessive and unreasonable to the extent of two cents per one hundred pounds, that under Section 9 of the Interstate Commerce Act Plaintiffs who have been charged this excessive rate of thirty cents per one hundred pounds by Defendants on lumber in carload lots shipped from Mobile, Alabama, to Fenton, Michigan, may sue Defendants direct in this Court to recover two cents per one hundred pounds on all such shipments.

Wherefore, said Plaintiff prays that said judgment of the Circuit Court of the United States for the Eastern District of Michigan, may be reversed.

CHOATE, WEBSTER, ROBERTSON & LEHMANN, *Attorneys for Plaintiff.*

Filed March 3, 1911.

Order Allowing Writ of Error.

United States Circuit Court, Eastern District of Michigan, Southern Division.

No. 8654.

A. J. PHILLIPS COMPANY, Plaintiff,
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND Haven & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, held at the Circuit Court Room in the City of Detroit on March 3rd, 1911.

Present: Hon. Henry H. Swan, District Judge.

The said Plaintiff having presented its petition for a Writ
16 of Error, together with Assignments of Error, the Court now allows said Writ of Error and fixes the bond at the sum of $300.00.

HENRY H. SWAN,
District Judge.

Filed March 3, 1911.

Citation.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Grand Trunk Western Railway Company, Detroit, Grand Haven & Milwaukee Railway Company, and Illinois Central Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the first day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Michigan, wherein the A. J. Phillips Company is Plaintiff in Error, and you are Defendant- in Error to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 3rd day of March, in the year of our Lord one

thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

HENRY H. SWAN,
United States District Judge.

Due and sufficient service of this citation is hereby accepted.

L. C. STANLEY,
Attorney for Def'ts in Error.

Dated March 8, 1911.

17 And afterwards towit on March 23, 1911, a præcipe for appearance of counsel was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

A. J. PHILLIPS COMPANY
v.
GRAND TRUNK WESTERN RAILWAY COMPANY et al.

Frank O. Loveland, Clerk of said Court:

Please enter our appearance as counsel for the Plaintiffs in Error.

CHOATE, WEBSTER, ROBERTSON & LEHMAN,
433 *Majestic Bldg., Detroit, Mich.*

And afterwards towit on September 27, 1911, motion to dismiss the writ of error was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE GRAND TRUNK WESTERN RAILWAY COMPANY et al., Defendants in Error.

18 Now comes the said Grand Trunk Western Railway Company, defendant in error, by L. C. Stanley, its attorney, and moves the Court to dismiss the writ of error as to said defendant in error for the following reasons, viz:

First. Because the sole question involved in this case as appears by the record thereof is the question of the jurisdiction of the Circuit Court of the United States for the Sixth District over the subject matter of this cause.

Second. For the reason that in such a cause the appellate jurisdiction from said Circuit Court of the United States is vested in the United States Supreme Court solely.

This motion is based on the record of the case and on the files of the Court in said cause.

Dated, September 26th, 1911.

L. C. STANLEY,
Attorney for the Grand Trunk Western Railway Company, Defendant in Error.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE GRAND TRUNK WESTERN RAILWAY COMPANY et al., Defendants in Error.

19 STATE OF MICHIGAN,
County of Wayne, ss:

McNess Ashley, being duly sworn, deposes and says that on this 26th day of September, 1911, he served a true copy of the attached motion and notice on Messrs. Choate, Webster, Robertson & Lehman by delivering the same in person to Mary Mills, who was then and there in charge of their office and in their absence at Detroit, Michigan.

McNESS ASHLEY.

Subscribed and sworn to before me this 26th day of September, 1911.

HAROLD R. MARTIN,
Notary Public, Wayne County, Michigan.

My commission expires April 20th, 1914.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE GRAND TRUNK WESTERN RAILWAY COMPANY et al., Defendants in Error.

Now comes the said Grand Trunk Western Railway Company, defendant in error, by L. C. Stanley, its attorney, and moves the Court to dismiss the writ of error as to said defendant in error
20 for the following reasons, viz:

First. Because the sole question involved in this case as

appears by the record thereof is the question of the jurisdiction of the Circuit Court of the United States for the Sixth District over the subject matter of the cause.

Second. For the reason that in such a case the appellate jurisdiction from said Circuit Court of the United States is vested in the United States Supreme Court solely.

This motion is based on the record of the case and on the files of the Court in said cause.

Dated September 26th, 1911.

L. C. STANLEY,
Attorney for the Grand Trunk Western Railway Company, Defendant in Error.

Messrs. Choate, Webster, Robertson & Lehman, Attorneys at Law, Detroit, Michigan.

GENTLEMEN: You are hereby notified that I have this day entered a motion in said Circuit Court of Appeals, a copy of which is herewith served upon you, which states the reasons of the motion and the ground on which it is based. And further, that said motion will be brought on for hearing in the said Circuit Court of the
21 United States at the Court Room of said Court in Cincinnati, Ohio, on Tuesday, the 3rd day of October, 1911, at the opening of said Court on that day or as soon thereafter as counsel can be heard.

Yours, etc.,

L. C. STANLEY,
Attorney for the Grand Trunk Western Railway Company, Defendant in Error.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE GRAND TRUNK WESTERN RAILWAY COMPANY et al., Defendants in Error.

STATE OF MICHIGAN,
County of Wayne, ss:

McNess Ashley, being duly sworn, deposes and says that on this 26th day of September, 1911, he served a true copy of the attached motion and notice on Messrs. Choate, Webster, Robertson & Lehman by delivering the same in person to Mary Mills, who was then and there in charge of their office and in their absence at Detroit, Michigan.

McNESS ASHLEY.

Subscribed and sworn to before me this 26th day of September, 1911.

HAROLD R. MARTIN,
Notary Public, Wayne County, Michigan.

22 My commission expires April 20th, 1914.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY et al., Defendants in Error.

Now comes the said Detroit, Grand Haven & Milwaukee Railway Company, defendant in error, by L. C. Stanley, its attorney, and moves the Court to dismiss the writ of error as to said defendant in error for the following reasons, viz:

First. Because the sole question involved in this case as appears by the record thereof is the question of the jurisdiction of the Circuit Court of the United States for the Sixth District over the subject matter of the cause.

Second. For the reason that in such a case the appellate jurisdiction from said Circuit Court of the United States is vested in the United States Supreme Court solely.

This motion is based on the record of the case and on the files of the Court in said cause.

23 L. C. STANLEY,
Attorney for the Detroit, Grand Haven & Milwaukee Ry. Co., Defendant in Error.

To Messrs. Choate, Webster, Robertson & Lehman, Attorneys at Law, Detroit, Michigan.

GENTLEMEN: You are hereby notified that I have this day entered motion in said Circuit Court of Appeals, a copy of which is hereby served upon you, which states the reasons of the motion and the ground on which it is based. And further, that said motion will be brought on for hearing in the said Circuit Court of the United States at the Court Room of said Court in Cincinnati, Ohio, on Tuesday, the 3rd day of October, 1911, at the opening of said Court on that day or as soon thereafter as counsel can be heard.

Yours, etc.,

L. C. STANLEY,
Attorney for the Detroit, Grand Haven & Milwaukee Railway Comapny.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE GRAND TRUNK WESTERN RAILWAY COMPANY et al., Defendants in Error.

24 STATE OF MICHIGAN,
County of Wayne, ss:

McNess Ashley, being duly sworn, deposes and says that on this 26th day of September 1911, he served a true copy of the attached motion and notice on Messrs. Choate, Webster, Robertson & Lehman, by delivering the same in person to Mary Mills, who was then and there in charge of their office and in their absence at Detroit, Michigan.

McNESS ASHLEY.

Subscribed and sworn to before me this 26th day of September, 1911.

HAROLD R. MARTIN,
Notary Public, Wayne County, Michigan.

My commission expires April 20th, 1914.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY et al., Defendants in Error.

Now comes the Illinois Central Railroad Company, defendant in error, by L. C. Stanley, its attorney, appearing especially for the purpose of making this motion, and not generally, and moves
25 the Court to dismiss the writ of error in this cause as to the said Illinois Central Railroad Company, for the following reasons, viz:

First. Because the sole question involved in this case as appears by the record thereof is the question of the jurisdiction of the Circuit Court of the United States for the Sixth District over the subject matter of the cause, and the person of said defendant in error.

Second. For the reason that in such a cause the appellate juris-

diction from said Circuit Court of the United States is vested in the United States Supreme Court solely.

This motion is based on the record of the case and on the files of the Court in said cause.

L. C. STANLEY,
Attorney for said Illinois Central Railroad Company, Defendant in Error.

Messrs. Choate, Webster, Robertson & Lehman, Attorneys at Law, Detroit, Michigan.

GENTLEMEN: You are hereby notified that I have this day entered motion in said Circuit Court of Appeals, a copy of which is herewith served upon you, which states the reasons for the mo-
26 tion and the ground on which it is based. And further, that said motion will be brought on for hearing in the said Circuit Court of the United States at the Court Room of said Court in Cincinnati, Ohio, on Tuesday, the 3rd day of October, 1911, at the opening of said Court on that day or as soon thereafter as counsel can be heard.

Yours, etc.,

L. C. STANLEY,
Attorney for said Illinois Central Railroad Company.

And afterwards towit on October 10, 1911, said motion was submitted to the Court in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY
vs.
GRAND TRUNK WESTERN RAILWAY CO. et al.

Before Warrington & Denison, C. J. J., and Hollister, D. J.

Motion to dismiss the writ of error is argued by Mr. L. C. Stanley for the motion and by Mr. Clyde I. Webster contra, and is submitted to the Court.

And afterwards towit on October 14, 1911, an order was entered on said motion in the words and figures as follows:

27 United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY et al.

Motion to dismiss the writ of error in this cause is continued to be heard with the case on the merits.

And afterwards towit on February 8, 1912, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY et al.

Before Warrington, Knappen, and Denison, C. J. J.

This cause is argued by Mr. Clyde I. Webster for the plaintiff in error and by Mr. L. C. Stanley for the defendants in error and is continued until tomorrow for further argument.

And afterwards towit on February 9, 1912, an entry was made in said cause clothed in the words and figures as follows:

28 United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY et al.

This cause is further argued by Mr. L. C. Stanley for the defendants in error and by Mr. Clyde I. Webster for the plaintiff in error and is submitted to the Court.

And afterwards towit on March 13, 1912, judgment was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY
vs.
GRAND TRUNK WESTERN RAILWAY COMPANY et al.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Michigan and was argued by counsel.

29 On Consideration Whereof, It is now hereby ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed with costs.

And afterwards towit on May 11, 1912, an opinion was filed in said cause in the words and figures as follows:

Opinion.

30 Filed Mar. 14, 1912. Frank O. Loveland, Clerk.

Filed May 11, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, DETROIT, GRAND Haven & Milwaukee Railway Company, Illinois Central Railroad Company and The Southern Railway Company, Defendants in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Submitted February 9, 1912: Decided March 13, 1912.

Before Warrington, Knappen and Denison, Circuit Judges.

This action was brought by the Phillips Company to recover damages alleged to have been sustained through excessive freight charges exacted by defendants. Ever since April, 1903, plaintiff has been engaged in the business of buying lumber and manufacturing door and window screens and other articles of commerce at Fenton, Michigan. Defendants are interstate carriers whose lines so connect as to enable shippers to move freight over them from Mobile, Alabama, to Fenton. Plaintiff caused a carload shipment of 38,800 pounds of lumber to be made over these lines from Mobile to Fenton, the shipment being commenced July 15, 1904; the rate charged by defendants was 30 cents per 100 pounds, and the claim is that this was two cents per 100 pounds in excess of a just and reasonable rate.

The basis of this claim is an order alleged to have been made by the Interstate Commerce Commission on February 7, 1905, and affirmed by the Supreme Court May 27, 1907. Neither the order nor the rates in terms appear in the declaration, and this is true also as to the names of the parties to the proceedings but these facts appear in the reported decisions, which are referred to by volume and page

in the declaration. The allegations of the first count of the
31 declaration in substance are that upon hearing, the Commission determined what was the reasonable freight rate to be charged per 100 pounds on lumber shipped in car loads from points in territory lying east of the Mississippi River in Louisiana, Mississippi and part of Alabama, to points on the Ohio River and as to shipments destined to points north of the river; and further that a certain increase in rates of two cents per 100 pounds, which had been made and put into force April 15, 1903, on such shipments was unlawful, unreasonable and excessive to that extent. The declaration contains 216 counts. The first count only is set out in the record brought here, but it is agreed that the rest of the counts are the same as this, except as to amounts and dates of shipments and deliveries, such shipments running from April 29, 1903, to August 15, 1904. The damages claimed in the first count are $6.86, and in all the counts, $1,808.65. The plaintiff was not a party to the proceedings before the Interstate Commerce Commission. The claim is that the finding of the Commission inures to the benefit of plaintiff, as well as to other shippers who were parties.

Service of copy of declaration and rule to plead was made upon counsel, who accepted same for the Grand Trunk Western and the Detroit, Grand Haven & Milwaukee companies. Service was made on the Illinois Central Railroad by delivery of similar copy to T. F. Sweat, Commercial Agent of the company and in charge of its offices in Detroit. Process was never served upon the Southern Railway Company, and no appearance was ever made in its behalf. The Grand Trunk Company appearing specially and objecting to the jurisdiction of the court, demurred to the declaration, assigning four causes, the last one however being abandoned. It appears from the judgment entry and assignments of error that the Detroit, Grand Haven & Milwaukee appeared specially and demurred the same as did the Grand Trunk. The Illinois Central appeared specially and objected to the jurisdiction of the court and moved to set aside service on Sweat as agent. The court below sustained the two demurrers and the motion, stating that "it was without jurisdiction;" the Southern Railway Company was dismissed for want of either service or appearance, and need not be noticed further. No question is raised touching the sufficiency of service upon the Grand Trunk or the Detroit, Grand Haven and Milwaukee companies, but sufficiency of service upon the Illinois Central is contested on the grounds that the company is an Illinois corporation having no station or line of road in Michigan, and that Sweat was not a station agent or ticket agent or representative of the road in the sense that service upon him was service upon the company. Motion
32 to dismiss was made in this court by defendants on the ground that plaintiff's only remedy is by proceedings to be taken directly to the Supreme Court.

Warrington, Circuit Judge (after stating the facts as above):

The contention of plaintiff is that two questions are involved—one of jurisdiction and the other upon the merits of the action; while the contention of defendants is that the only question arising

is that of jurisdiction. The ultimate theory of defendants is (*a*) that as to all the companies the issues concern only the jurisdiction of the Circuit Court as a Federal Court; and (*b*) that since the Illinois Central is a foreign corporation having no line of road or station in Michigan, the additional point arises whether Sweat is an agent upon whom service of process could properly be made, and it is urged that he is not.

In the view we take of the case, we may for the present pass the question whether the court obtained jurisdiction of the person of the Illinois Central Company; for since due service of process was admittedly made upon the remaining companies, we shall as to those companies have to determine the issue concerning the jurisdiction of the Circuit Court as a Federal Court. It is stated in the third ground of demurrer of these two defendants:

"It does not appear and is not alleged in said declaration that the Interstate Commerce Commission of the United States has ever passed upon the reasonableness, legality, justice, propriety or otherwise of the said rates of freight, nor has it made any order of reparation or payment in the premises."

It is manifest that it was intended in this way to raise the question whether it was not necessary as a condition precedent to the jurisdiction of the Circuit Court to allege that an order had previously been made by the Interstate Commerce Commission finding that the particular freight rate in dispute was unreasonable, fixing the amount of plaintiff's damages, and awarding it reparation. This is a challenge upon principles of general law concerning the right of the Circuit Court to entertain the action, and not of its jurisdiction as a Federal Court; and this we think is the true interpretation of the judgment below. Whether the allegations touching such previous action of the Interstate Commerce Commission are sufficient in law to entitle plaintiff to maintain this suit, is clearly a question that the Circuit Court could rightfully consider and determine. If they are (and we lay aside the question of lapse of time for the present), the Circuit Court clearly had jurisdiction under Section 16 of the Act to regulate Commerce to entertain the action (34 U. S. 33 Stat. L. 590 24 U. S. Stat. L. 384). Defendant's contention therefore comes to be, that the Circuit Court's jurisdiction as a Federal Court is involved solely because it might have held that the facts stated in the declaration do or do not constitute a cause of action. In Fore River Shipbuilding Co. v. Haag, 219 U. S. 175, in passing upon Section 5 of the Court of Appeals Act respecting the direct review there given, Mr. Justice Day said (178):

"The Court has had frequent occasion to determine what is meant in the statute providing for review of cases in which the jurisdiction of the court is in issue, and it has been held that the statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but the jurisdiction of the Court as a Federal Court."

See also Boston & Maine Railroad Co. v. Gokey, 210 U. S. 155, 166; Louisville Trust Co. v. Knott, 191 U. S. 225; Bache v. Hunt, 193 U. S. 523, 525.

Clearly the present case presents a question upon the merits, as well as one of jurisdiction. In such cases, it is open to the defeated party to elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case In Olds v. Hettler Lumber Co., decided by this Court March 5, 1912, to be reported, Judge Denison said:

"It is well settled that where the only question properly raised by the assignments of error is that of the jurisdiction of the trial court, this court can not review, but such writ of error must be taken directly to the Supreme Court (Remington v. Cent. Pac. R. R., 198 U. S. 95, 97; Coler v. Grainger Co.—C. C. A., 6th Cir.—74 Fed. 16, 21; Kentucky State Board v. Lewis,—C C. A., 6th Cir.—176 Fed. 556); and also that if the trial court did decide and if the assignments of error do fairly raise an independent question of general law as well as the question of jurisdiction, then this Court has power to hear and decide all the questions (Boston & Maine R. R. Co. v. Gokey, 210 U. S. 155, and cases cited; see also review of decisions in Morisdale Co. v. Pennsylvania Co.,—C. C. A. 3rd Cir.—183 Fed. 929, 938)."

See rule 2 and decisions commented on in its support in Morisdale Coal Co. v. Pennsylvania R. Co., supra (183 Fed. at 942 et seq.); Loveland Appellate Jur., Section 105, and decisions there cited.

The trial court sustained the demurrers and this is assigned as error. It follows that it is the duty of this court to pass
34 upon the sufficiency of the declaration.

The declaration fails in terms to state the particular rates that were passed upon by the Interstate Commerce Commission. The allegation of the declaration indicates that it was the purpose of plaintiff by reference to incorporate the pertinent facts of the decisions into the declaration. We think the decision of the Supreme Court in Robinson v. B & O. R. R. Co., 222 U. S. 506, 512, warrants examination of the facts set out in those decisions, to-wit, Central Yellow Pine Association v. Illinois Central R. Co., 10 I. C. C. 505; Illinois Central R. Co. v. Interstate Com. Com., 206 U. S. 441. The rate in dispute in those cases was one of sixteen cents per 100 pounds of lumber carried in carloads from the lumber producing territory in the South, described in the statement, to points on the Ohio River. For several years prior to April 15, 1903, the rate was fourteen cents. The through rates from the points of origin in the South to points north of the Ohio River, within the Central Freight Association Territory, were made up as follows: the fourteen-cent rate charged south of and to the Ohio River (including the crossing) was added to the sum of the local rates charged thence by the roads north of the river to the point of destination. The issue there involved was, whether the railroads could rightfully add two cents to the fourteen-cent rate for moving the lumber north to Ohio River points. The Commission held that they could not.

It is alleged in the declaration that plaintiff was charged thirty cents per 100 pounds for shipments from Mobile to Fenton, and that this was two cents in excess of a reasonable rate. Plainly, dur-

ing the period that the sixteen-cent rate south of the river was in force, the sum of the local rates charged by the roads for service north of the Ohio River was fourteen cents. It must be presumed, in the absence of allegation to the contrary, that the rate charged and paid north of the river was published and filed and also reasonable; and on demurrer to the present declaration the sixteen-cent rate south of the river must be regarded as unreasonable to the extent of two cents per 100 pounds.

Can the plaintiff then make the order of the Interstate Commerce Commission, respecting the rate south of the river, the basis for recovery of its alleged damages? Aside from other obvious questions, this must depend upon whether the Interstate Commerce Act furnishes an exclusive remedy for recovering such damages. In one sense it would seem unnecessary for plaintiff to present its complaint to the Commission before instituting an action like this. One of the potent reasons stated in the decisions for requiring claimants to present such matters to the Commission is that the rate question in all respects is administrative in its nature; and that the Commission is a special tribunal created by act of Congress to determine such questions. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. B. & O. Railroad Co., supra.

It is insisted that the present suit is maintainable under Section 9 of the Act to regulate Commerce passed February 4, 1887 (24 Stat. L. 382). That section provides that any person claiming to be damaged by a common carrier subject to the provisions of the act

"may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt."

The policy and intent of Congress, however, in creating the Commission as a special tribunal to pass upon rate questions can not be fully described, without stating its further intent respecting the time within which complaints for the recovery of damages shall be filed with the Commission. Section 16 of the same act as amended (34 U. S. Stat. L. 590) provides that if after complaint and hearing, as provided in Section 13, the Commission shall determine that complainant is entitled to an award of damages, it shall make an order directing the carrier to pay the sum fixed by a day named; and that if the carrier does not comply with the order, the complainant or any person for whose benefit the order is made may enforce it in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier or through which the road of the carrier runs. And the section further provides:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action

accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this act may be presented within one year."

36 This act was passed June 29, 1906, and it took effect August 28 (34 Stat. L. 584, 590, 838). The last shipment now in dispute was made August 15, 1904, and this action was commenced May 11, 1909. It is apparent, indeed it is conceded, that if plaintiff's claim is affected by Section 16 it is barred by lapse of time. The burden is therefore upon plaintiff to show that the suit can be maintained under Section 9. It was decided in the Abilene case that money exacted by a carrier which was claimed to be in excess of a reasonable rate could not be recovered, in the absence of a showing that the alleged unreasonableness of the rate had been determined by the Interstate Commerce Commission. In the Robinson case, the same conclusion was reached concerning a rate (as to cost of loading cars) that was alleged to be unjustly discriminatory. Damages arising from the exaction of such a rate are so related to it in character and circumstance, as to present considerations kindred to those involved in the inquiry as to complaints of the rate itself. The reasons entering into the conclusion of the Commission that a rate is unreasonable or discriminatory, might not be convincing that all persons paying the rate were entitled to reparation. The new rate fixed by the Commission is for the benefit of the public, as well as complainants. The present plaintiff does not allege that the excessive rate of which it complains, was charged or paid against its objection or protest. It might well be that plaintiff then regarded the through rate, as an entirety, as fair and reasonable, and so for that reason or for other reasons may have paid the rate voluntarily. The fact that plaintiff made no complaint to the Commission at all and suffered so long a time to elapse before taking any action whatever to recover the excess, justifies an inference that it was satisfied with the rate. These and similar considerations emphasize the fact that the question whether rates are unreasonable or discriminatory is vitally related to all questions of reparation for their exaction.

The claim in the Robinson case was for an exaction made of fifty cents more per ton when coal was loaded into cars from wagons than when loaded from a tipple. It was contended that recovery was warranted in Section 22 of the act which provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Of this Mr. Justice Van Devanter said (222 U. S. 511):

"Of course, the provision in Section 22, as also the provision in Section 9, must be read in connection with other parts of the act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision rec-

37 ognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or

State, in the absence of an appropriate finding and order of the Commission."

True, the learned justice was there speaking of the necessity for a previous finding and order of the Commission as to the reasonableness of a distinction made between loading from wagons and loading from a tipple; but apart from what was there said of reparation, the rule of interpretation laid down is suggestive of a rule that should be applied here. Section 16 provides, as before pointed out, that if after hearing on a complaint made as provided in Section 13 of the act, the Commission shall determine that any person complaining is entitled to an award of damages, the Commission shall make an order directing the carrier to pay. Section 13 provides generally that persons complaining of anything done by a carrier in contravention of the act may apply to the Commission by petition and in case the carrier shall fail after notice from the Commission to make reparation, the Commission shall investigate the matters complained of. As illustrative of the simplicity and dispatch intended by the act for the benefit of shippers, we may refer to a decision of this court holding that the filing of a letter of complaint is sufficient to warrant action on the part of the Commission. Louisville & N. R. Co. v. Dickerson, 191 Fed. 705, 711.

It is clear that all complaints respecting unreasonable or discriminatory rates must be made in pursuance of Section 13. That section is by reference incorporated into Section 16, which distinctly limits the time within which such complaints shall be filed. It results, we think, that the remedy thus provided is exclusive as respects alike complaints as to rates and reparation consequent upon their exaction. We are not unmindful of the decision in Southern Railway Co. v. Tift, 206 U. S. 428, where, in view of previous stipulation of the parties, the court refused to interfere with the action of the court below in adjudging reparation after the Commission had declared the rates unreasonable; but the Court rested its decision "upon the stipulation" (440); and construing the decision in the Abilene case, Mr. Justice McKenna said (439):

"And it was in effect held that reparation after such action for the excess above a reasonable rate must be by a proceeding before the Commission, 'because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one.' "

The language thus quoted was in part derived from the opinion of the present Chief Justice in the Abilene case, in which he
38 was analyzing the power vested in the Commission "to compel the establishment of a new schedule of rates applicable to all" and also to grant reparation; the learned justice saying (446):

"And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one."

Further, it is to be observed that the limitations prescribed by

Section 16 apply as stated to "all complaints for the recovery of damages;" and it requires that "they shall be filed with the Commission within two years from the time the cause of action accrues, and not after." This is certainly very comprehensive. As the section existed at the date of the shipment in question (July 15, 1904), it did not contain this limitation or any other in point of time. But as the section was amended June 29, 1906 (and took effect in sixty days after approval, 34 U. S. Stat. L. 838) the limitation in time was imposed as before pointed out. It required that the petition for enforcement of an order to pay money shall be filed in the Circuit Court "within one year from the date of the order, and not after: Provided, That claims accrued prior to the passage of this Act may be presented within one year." This Court in L. & N. R. Co. v. Dickerson, supra, held (711) "that claims accruing before August 28, 1906, may be presented within one year from that date, even though accruing more than two years previous to the date named." We have already stated that the present action was not commenced until May 11, 1909, a period of nearly three years (instead of one year) after the act took effect. It is urged that under Section 9, the plaintiff was entitled to bring suit at any time within the limit of actions for debt. This limitation, of course, would be determined according to the statutes of the several states. Surely, one feature of the intent of Congress in its enactment of the limitations in question was to establish uniformity in time, as well as forum, in which such damages might be enforced. It is a subject clearly within the power of Congress, for it relates alone to interstate roads and commerce. To permit persons to maintain actions based upon orders of the Commission to recover damages for excessive rates within the varying periods fixed as to actions for debt, would at once create confusion respecting the operation and effect of rate orders made by the Commission, and obviously contravene the clearly defined policy of Congress. The logic of the plaintiff's insistence is that it might maintain this suit under Section 22, as well as
39 under Section 9, and so enforce its claim in either a state or federal court, regardless of the limitations in point of time in section 16. No decision is cited and we do not know of any that sustains such an action.

From what has been said it necessarily follows that the motion made in this court by the Grand Trunk and Detroit, Grand Haven & Milwaukee Railways to dismiss the writ of error must be denied. The similar motion made by the Illinois Central requires separate consideration. The motion of that company in the court below presented by its earlier grounds a point of personal jurisdiction (as to service upon Sweat), and by its fifth ground the point that the declaration is not good. Here was a question of general law as well as one of jurisdiction; but under our holding in Olds v. Lumber Co., this fifth ground could have been considered by the Circuit Court only as a waiver of the jurisdictional point made by the other grounds and so the only ultimate question raised by the motion was jurisdictional. It might therefore seem that the only review as to that company was in the Supreme Court, and that its

motion in this court to dismiss should be granted; but owing to the peculiar situation here existing, we think this result does not follow. The action was against several defendants, of which this railroad was one; the liability of each seems to depend upon the same ground; no proceeding was taken by plaintiff or demanded by the Illinois Central for a severance; the case continued as one case as to all defendants. It would be anomalous to require in such case separate writs of error, one to the Supreme Court as to one defendant and another to this court as to other defendants. There seems to be substantial analogy between the situation arising where one defendant presents a question of jurisdiction and a question on the merits, and a case where with several joint defendants a question of jurisdiction exists as to one and a question on the merits as to others; and this analogy leads us to conclude that in the latter situation as in the former, the entire case may be brought to this court in a unitary way and we may consider the question of jurisdiction, although as to one defendant it was the sole question which existed below.

It follows that the motion by the Illionois Central to dismiss the writ of error must be denied; and while we have power to review the question whether good personal service on that railroad was had, yet it becomes unnecessary to do so because of the conclusion we have reached that plaintiff has no case on the merits.

The judgment below must be affirmed with costs.

40 And afterwards towit on March 6th, 1913, a stipulation with reference to the record on appeal was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,

vs.

GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants in Error.

In the above entitled cause it is hereby stipulated by the attorneys for the parties hereto, that the Clerk, in making a transcript of the record for use in the Supreme Court of the United States in said cause, shall include therein only the following papers and records, towit:

The printed record filed in said cause, a statement of the fact of motion in C. C. A. and its disposition, the opinion of said Circuit Court of Appeals, the judgment thereof, the assignment of errors, the petition for writ of error, the supersedeas bond and this stipulation.

CHOATE, WEBSTER, ROBERTSON & LEHMAN,
Attorneys for Plaintiff in Error.

Dated — A. D. 1913.

41 L. C. STANLEY,
Attorney for Defendants in Error

And on the same day towit March 6th 1913, a petition for writ of error and assignments of error were filed which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company, and The Southern Railway Company, Defendants in Error.

Petition for Writ of Error.

Your petitioner, The A. J. Phillips Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause was lately pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on the 13th day of March A. D. 1912, affirming a judgment of the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, and that the matter in controversy in said suit exceeds One Thousand Dollars, besides costs, and that the jurisdiction of none of the courts above men-
42 tioned, is or was dependent in anywise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner respectfully prays that a writ of error be allowed to him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause, and all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE A. J. PHILLIPS COMPANY,
Plaintiff in Error,
By CHOATE, WEBSTER, ROBERTSON, & LEHMAN, *Their Attorneys.*

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff in error giving bond, according to law, in the sum of $300.

J. W. WARRINGTON,
Circuit Judge.

43 United States Circuit Court of Appeals for the Sixth Circuit.

2168.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, defendants in Error.

And now comes the plaintiff in error, The A. J. Phillips Company by —— ——, —— ——, its attorneys and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Sixth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, in favor of said defendants in error and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid and in not remanding said cause to the District Court for further proceedings.

Third. Said Circuit Court of Appeals erred in not sustaining the assignments of error and each and every of them upon the record in said cause.

Fourth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendants in error for costs of suit in said Circuit Court of Appeals.

Wherefore the said The A. J. Phillips Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, said judgment of the said United States Circuit Court of Appeals, as well as the said judgment of said United States Circuit Court, be reversed, annulled and for naught esteemed and that said cause be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, with instructions to overrule the demurrers and each of them in said cause, or for such further proceedings in said cause as may be determined upon by the
45 Supreme Court of the United States, to the end that justice may be done in the premises.

CHOATE, WEBSTER, ROBERTSON & LEHMAN,
Attorneys for Plaintiff in Error.

And on the same day, towit March 6th 1913, a bond was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

Know all men by these presents, That we, The A. J. Phillips Company, a corporation, as principal, and E. A. Phillips, Fenton, Mich., as surety, are held and firmly bound unto Grand Trunk Western Railway Co., Detroit, Grand Haven & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, all corporations, in the full and just sum of Three Hundred ($300.00) Dollars, to be paid to the said four corporations last named, their successors or assigns; to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this 4th day of March, A. D. 1913.

Whereas lately, at a term of the United States Circuit
46 Court of Appeals for the Sixth Circuit, in a suit depending in said court between the A. J. Phillips Company, plaintiff in error, and Grand Trunk Western Railway Co., Detroit, Grand Haven & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, defendants in error, a judgment was rendered against the said, The A. J. Phillips Company, and the said, The A. J. Phillips Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Grand Trunk Western Railway Co., Detroit, Grand Haven & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the — day of —— next.

Now, the condition of the above obligation is such that if the said, The A. J. Phillips Company shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

47 THE A. J. PHILLIPS COMPANY,
By W. B. PHILLIPS, *President.*

Attest:
H. J. PHILLIPS, *Secretary.*
E. A. PHILLIPS, *Surety.* [SEAL.]

Sealed and delivered in the presence of:
EFFIE M. BISHOP,
PERRY BENTLEY,
as to W. B. Phillips.
STELLA CHRIST,
C. F. SIMPSON,
as to H. J. Phillips.

Sealed and delivered in the presence of:
STELLA CHRIST AND
C. F. SIMPSON,
as to E. A. Phillips.

Approved by:
J. W. WARRINGTON,
Circuit Judge, Sixth U. S. Cir.

E CUT OFF

STATE OF MICHIGAN,
County of Genessee, ss:

E. A. Phillips, residing at Fenton in the County and State aforesaid, who offers himself as surety for The A. J. Phillips Company, being duly sworn, deposes and says, that he owns in his own right real estate in said City, the legal description of which is as follows, towit: Lot Three (3) Block Forty Eight (48) Original Plat, Village of Fenton (Fisher Place), that the title to the same is in his own name only; that the value of the same is not less than Seven Hundred ($700.00) Dollars, and that it is subject to no incumbrance; that there are no unsatisfied judgments or executions against him; that he is worth the above amount in good property
48 over and above all debts, liabilities and lawful claims against him, and all liens, incumbrances and lawful claims upon his property.

E. A. PHILLIPS.

Subscribed and sworn to before me this 4th day of March, A. D. 1913.

[SEAL.] EFFIE M. BISHOP,
Notary Public, Genessee County, Michigan.

My commission expires Mar. 14, 1916.

And on the same day, towit, March 6th, 1913 a writ of error was allowed clothed in the words and figures as follows:

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The A. J. Phillips Company, plaintiff in error, and Grand Trunk Western Railway Co., Detroit, Grand Haven & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of March, A. D. 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

Allowed by:
J. W. WARRINGTON,
Cir. J., 6th Cir.

Filed Mar. 6, 1913. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit, *ss:*

In pursuance of the command of the within writ of error, I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby transmit under the seal of said Court, a true, full and complete copy of the record and proceedings in said Court pursuant to stipulation filed March 6, 1913, in the cause and matter in said writ of error stated; together with all things concerning the same, to the Supreme Court of the United States, together with said writ of error and the citation to said defendant in error.

Witness my official signature and the seal of said Court at Cincinnati, Ohio, in said Circuit, this 7th day of March, 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Grand Trunk Western Railway Co., Detroit, Grand Haven & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein The A. J. Phillips Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Warrington, Justice of the United States Circuit Court of Appeals for the Sixth Circuit, this — day of ——, A. D. 1913.

J. W. WARRINGTON,
Justice of the United States Circuit Court of Appeals for the Sixth Circuit.

I accept service of this citation this — day of ——, A. D. 1913.

L. C. STANLEY,
Attorney for Defendants, G. T. W. R'y Co. & D., G. H. & M. R'y Co.

[Endorsed:] 2168. Citation.

51 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings and original writ of error and citation in the case of The A. J. Phillips Company vs. Grand Trunk Western Ry. Co. et al. No. 2168, pursuant to stipulation filed March 6, 1913, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of March, A. D. 1913.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

52 The Supreme Court of the United States.

THE A. J. PHILLIPS COMPANY, Plaintiff in Error,
vs.
GRAND TRUNK WESTERN RAILWAY CO., DETROIT, GRAND HAVEN & Milwaukee Railway Co., Illinois Central Railroad Company and the Southern Railway Company, Defendants in Error.

Error to United States Circuit Court of Appeals, 6th Circuit.

STATE OF ILLINOIS,
County of Cook, ss:

George M. Stephen, of said County, being duly sworn on his oath says that he is the agent in this behalf duly authorized of the plaintiff in error above named, and is personally acquainted with the facts as to shipments and payments of freight mentioned in the declaration in the above entitled cause; that the two cents per hundred pounds alleged in said declaration to be the excessive portion of said freight rates, amounts on the freight so paid on the shipments declared on in said declaration, to a total of more than Eighteen Hundred Dollars ($1,800.00); that the matters referred to are in controversy in this suit and the amount so in controversy exceeds the sum of Eighteen Hundred Dollars exclusive of interest, attorney's fees and costs.

G. M. STEPHEN.

Subscribed and sworn to before me this 6th day of March, A. D. 1913, *1913*, and I do hereby certify that by virtue of the laws of Illinois, I have full power and authority to administer oaths to affiants and to certify to affidavits.

[Seal E. H. S. Martin, Notary Public, Cook County, Ills.]

E. H. S. MARTIN,
Notary Public.

[Endorsed:] United States Supreme Court, No. —. A. J. Phillips Co., P'f in Error, vs. Grand Trunk Western Ry. Co. et al. Affidavit (amount in controversy).

Endorsed on cover: File No. 23,581. U. S. Circuit Court Appeals, 6th Circuit. Term No. 124. The A. J. Phillips Company, plaintiff in error, vs. Grand Trunk Western Railway Company et al. Filed March 10th, 1913. File No. 23,581.

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 124.

THE A. J. PHILLIPS COMPANY, PLAINTIFF IN ERROR,

vs.

GRAND TRUNK WESTERN RAILWAY CO., ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Plaintiff in Error.

EDWARD H. S. MARTIN,
GEORGE M. STEPHEN,
Attorneys for Plaintiff in Error.

PEERLESS QUALITY PRESS, CHICAGO

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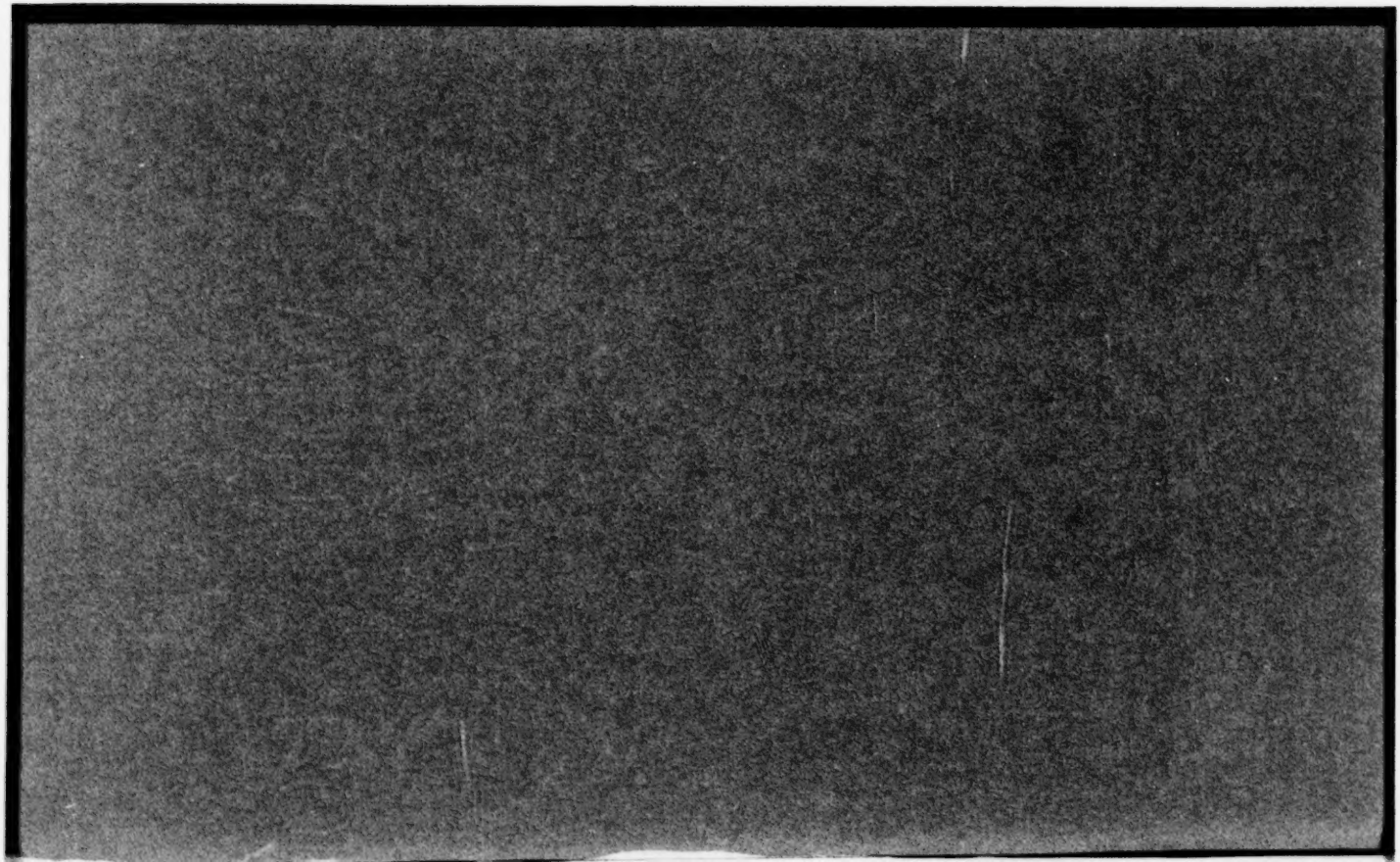

(23,581.)

Supreme Court of the United States.

OCTOBER TERM, A. D. 1914.

No. 124.

THE A. J. PHILLIPS COMPANY,
Plaintiff in Error.

vs.

GRAND TRUNK WESTERN RAILWAY CO., ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

Plaintiff in error sued defendants in error in the United States Circuit Court for the Eastern District of Michigan, to recover the excessive portion of freight charges exacted from it by defendants on certain shipments of lumber from Mobile, Alabama, to Fenton, Michigan, made during the period from April 29, 1903, to August 15, 1904. The rate exacted was that named in the tariff filed with the Interstate Commerce Commission, but the declaration alleged that the Commission had decided that such rate was unreasonably and unjustly excessive to the extent of two cents per hundred pounds, which was the portion sought to be recovered

by plaintiff. The declaration did not claim that plaintiff had been a party to any proceedings before the Commission.

Service was accepted by the Grand Trunk and the Detroit, Grand Haven and Milwaukee companies. They did not contest the service, but filed demurrers to the declaration, alleging as grounds of demurrer absence of jurisdiction because of the fact that the Commission had never passed on plaintiff's shipments nor made any order for reparation to it.

The Illinois Central Railroad Company filed a motion to dismiss as to it. The first three grounds of this motion are that the service on its commercial agent was not good. The fourth ground of the motion is that the declaration seeks to recover alleged excessive, unreasonable and illegal freight overcharges. The fourth ground is substantially the same as the grounds of demurrer above mentioned.

The judgment order of the Circuit Court recited that the Court was without jurisdiction of the causes of action, sustained the demurrers and granted the motion to dismiss, and also dismissed the action against the Southern Railway Company for want of service on, or appearance by, it.

Plaintiff carried the case to the Court of Appeals and assigned as error the sustaining of the demurrers, the granting of the motion, and the judgment of dismissal.

Defendants made a motion to dismiss the writ of error, claiming that a question of jurisdiction only was involved and that the case should have gone direct to the Supreme Court.

The Court of Appeals decided that the case involved questions other than of jurisdiction of the Circuit Court as a federal court and denied the motion to dismiss, but affirmed the judgment.

The questions involved in the case are whether a shipper which has not taken part in a proceeding before the Commission can sue in a federal court to recover the unreasonable portion of an exacted rate after another shipper has filed a complaint, obtained a decision of the Commission declaring the rate unreasonable and to what

extent and ordering reparation in his favor; whether under the common law practice prevailing in Michigan the defense of limitations can be availed of by demurrer or motion to dismiss; if so, whether there is any federal statute of limitations applicable to an action of this kind under Section 9 of the Act to Regulate Commerce; and whether this case was within the jurisdiction of the Court of Appeals on writ of error instead of being reviewable solely by the Supreme Court on direct writ of error to the Circuit Court.

ERRORS RELIED UPON.

1. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, in favor of said defendants in error and against said plaintiff in error.

2. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court and in not remanding said cause to the District Court for further proceedings.

3. Said Circuit Court of Appeals erred in not sustaining the assignments of error and each and every of them upon the record in said cause.

4. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendants in error for costs of suit in said Circuit Court of Appeals.

BRIEF OF THE ARGUMENT.

The Interstate Commerce Act expressly says that a person damaged may *either* complain to the Commission or *bring suit* in any district court, but shall not have the right to pursue *both* remedies and *must elect* which of the *two* methods of procedure to adopt.

Sec. 9, Act to Regulate Commerce.

It is well settled that, because of the necessity for uniformity of decision throughout the country, Section 9 does not permit suit to be brought to recover alleged excessive freight charges exacted under a duly established tariff, where the Commission has never decided such rate to be unreasonable.

Robinson v. *B. & O. R. Co.*, 222 U. S. 506;
T. & P. R. Co. v. *Abilene C. O. Co.*, 204 U. S. 426.

However, where the right to sue under Section 9 carries no threat of destruction of such uniformity of decision, it is not to be supposed that the courts will decide such right to sue does not exist, in the face of oft repeated decisions that it is not for the courts, under the guise of construction, to repeal or nullify an enactment of the legislative body.

L. & N. R. Co. v. *Mottley*, 219 U. S. 467 (474, 479);
U. S. v. *Deleware Etc., Co.* 213 U. S. 366 (405);
St. L. Etc. Co. v. *Taylor*, 210 U. S. 281 (295);
36 Cyc. 1103 and 1128-9, and cases there cited.

Clearly, then, the provision for suit in Section 9 must refer to suits brought after the Commission has once decided the rate to be unreasonable, for then there would be no danger of conflict or interference with the desired uniformity of rates, as has been decided by the Court of Appeals of the Seventh Circuit in a very able opinion.

Nat. Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. 65;
14 Columbia Law Review, 512-14.

On this point the Robinson case, *supra*, on which the adverse decision in the case at bar purports to be based, is really in favor of plaintiff. That case does not pre-

tend to decide the question as to whether a person who has not taken part in a proceeding before the Commission, can sue in a federal court to recover the unreasonable portion of an exacted rate after another shipper has filed a complaint, obtained a decision of the Commission declaring the rate unreasonable and to what extent and ordering reparation in his favor. In applying this Robinson case to the case at bar, *what is not said* is of as great significance as *what is said*, if not greater. In that case Robinson, it was conceded, had not been a party to any proceeding before the Commission. If that fact was sufficient to bar him from suing, *why not say so?* What better, simpler, or more conclusive reason for the decision could have been given? Instead, the opinion carefully avoided announcing any such principle of law, but entered upon a long and highly technical discussion of the omissions or defects in the order and decision of the Commission *in favor of someone else*, that would prevent Robinson from relying on it as a basis of *his* suit. Moreover, the language used in the opinion is so carefully worded, that not a single sentence denies the right of a shipper to sue, without appearing before the Commission, when another shipper has had the rate declared unreasonable to a certain extent and obtained the Commission's order of reparation. Does it not seem that under these circumstances the opinion recognized, when it carefully refrained from denying, the existence of this right?

The language used by the Supreme Court in denying the right of suit in the Robinson case, in many instances seems to furnish a very good argument for the existence of the right after some other shipper has once obtained a proper finding of the Commission. For instance, the following:

> "But the statement did not disclose, or even suggest, that the schedule had been the subject of a complaint to the Interstate Commerce Commission, or had been found by the Commission to be justly discriminatory or that the railroad company had been ordered by the Commission to desist from giving effect to the schedule, or to make reparation to Robinson *or any other shipper* because of prior exactions thereunder."

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules and of redressing injuries resulting from their enforcement was adopted where publicity would be given to the rates, their application would be obligatory and *uniform* while they remained in effect, and the matter of their conformity to prescribed standards would be committed *primarily* to a single tribunal clothed with authority to investigate complaints and to order the correction * * * *"

"And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon the carrier and shipper *until changed in the manner provided*, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the *uniformity and equality* which the act was designed to secure."

"if the power existed in both courts and the Commission to *originally* hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance, and unreasonable by a court *acting originally*, and thus a conflict would arise which would render the enforcement of the act impossible."

"if a court, *acting originally* upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory upon both carrier and shipper."

"it is apparent that neither provision recognizes or implies that an action for reparation, *such as is here sought*, may be maintained in any court, federal or

state, in the absence of an appropriate finding and order of the Commission."

Let us apply this language and reasoning to the case at bar. If we are allowed to sue and base our recovery on the decision of the Commission in favor of another party, the uniformity of the rate is not destroyed, nor is the primary right of decision in the Commission interfered with; the rule is still recognized that the published rate is obligatory "until changed in the manner provided;" there is no destruction of the uniformity and equality which the act was designed to secure; there is no opportunity for divergence between the action of the Commission and the decision of a court, because the Commission *has acted originally* and the *court* does not act originally, but *secondarily*, and in line with the previous decision of the Commission; and the action is not of the nature referred to in the Robinson case when the court spoke of "an action for reparation, *such as is here sought*," i. e., without a finding by the Commission that anybody is entitled to reparation. On the other hand the object of the act is to secure uniformity and equality, and a denial of our right to sue would itself be destructive of that uniformity and equality. The shippers who complained before the Commission have, in that proceeding, obtained reparation, or in other words, a lawful rebate. We learned of that decision too late to complain to the Commission, but not too late to sue, if suit can be maintained under Section 9. Some shippers have lawfully had the benefit of a through rate, while we have been compelled to pay a higher rate. The only way in which this discrimination and inequality can be remedied, and that "uniformity and equality which the act was designed to secure" preserved, is to permit us to maintain our suit. If we cannot sue then the provision of Section 9 allowing shippers to *elect* whether to *complain* to the Commission *or sue* in a court but forbidding the pursuit of both methods is absolutely meaningless. The right of election is valuable and highly proper. In many cases the decision of the Commission comes too late to permit others to take advantage of it and complain to the Commission, leaving a suit as their only redress.

Certain language used in a later case seems conclusive

in favor of our contention. In that case, in discussing the confusion that would result if courts were given jurisdiction to decide questions of reasonableness originally, the Supreme Court said, (p. 257):

> "Manifestly, different verdicts would occasion inequality between the two shippers and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two or a score of shippers could equally avail themselves * * * * But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiffs the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited."
>
> *Mitchell C. Co.* v. *Penn. R. Co.*, 230 U. S. 247 (257).

Speaking of the common law right to recover for discrimination the same opinion says (p. 258):

> "But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or as an undue preference. Such

orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order."

(p. 259). "Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and shippers are alike bound to treat them as lawful. After the rate had been abandoned the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the Commission determines that what was apparently reasonable had in fact been unreasonable."

(p. 264) "What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body. The courts can then apply that law, and, measuring what has been charged, by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful."

Idem, 258, 259, 264.

In a still later case the following significant statement is made:

"The report and order gave the plaintiff no preference over other shippers, since they showed that 15 cents of the rate charged by the Denver & Rio Grande was unreasonable. If such a finding of unreasonableness was not sufficiently general to inure to the benefit of all other shippers, they could, on application, have secured such a modification as to enable them to maintain a suit for the recovery of damages for unjust charges and collections in the past."

Bear Bros. M. Co. v. *D. & R. G. R. Co.*, 233 U. S. 479 (489).

The Tift cases support our contention that plaintiff can rely on the Commission's decision in a proceeding to which it was not a party. The Tift case was commenced in court before the Commission passed upon the rate. Afterward, on complaint of some of the parties but not all, the Commission declared the rate unreasonable. The court gave reparation to all the shippers whether parties to the preceeding before the Commission or not.

So. Ry. Co. v. *Tift*, 206 U. S. 428;
Tift v. *So. Ry. Co.*, 159 Fed. 555.

The Court of Appeals says that this was based "upon the stipulation," but we fail to see the claimed distinction. If payment by a carrier to a shipper of the portion of a charge which the Commission has held unreasonable in a proceeding to which the shipper was not a party is unlawful without a stipulation, it cannot be that a stipulation would make any difference. That would merely be a stipulation that an unlawful or criminal act might be committed, and would not justify a court in aiding or sanctioning the commission of the crime.

The defense of statute of limitations was not raised by the pleadings in the case at bar, and therefore can not be availed of by defendants. Under the common law practice prevailing in Michigan, the bar of the statute must be raised by plea, and cannot be availed of upon demurrer or motion to dismiss.

First N. Bank of Ovid v. *Steel*, 136 Mich. 588;
25 Cyc. 1396.

Regardless of this, however, the action is not barred. While the Interstate Commerce Act fixes a limitation of time to file complaint with the Commission and one year to apply under Section 16 for the enforcement of the order of the Commission by a person who has filled such complaint, the act does not establish any limitation at all for suit in court under Section 9. The action in court is therefore limited by the state statute of limitations only.

Campbell v. *Haverhill*, 155 U. S. 610 (614);
O'Sullivan v. *Felix*, 233 U. S. 318.

The opinion in the case at bar alludes to the absence from the declaration of any allegation that the payments exacted were made under protest. It has never been considered that it was necessary to pay under protest. Such protest, would have been useless, because prior to the decision of the Commission the law made it illegal for the carriers to accept anything but the tariff rate, protest or no protest.

From the questions that have been considered herein it is apparent that this case involves much more than questions of jurisdiction of the court as a federal court, and that the demurrers raised questions as to the merits as well as of federal jurisdiction. Therefore the Court of Appeals was right in holding that a review was sought in the correct forum.

Bache v. *Hunt*, 193 U. S. 523;
Louisville Trust Co. v. *Knott*, 191 U. S. 225.

We respectfully submit that the judgments of the Circuit Court of Appeals and the Circuit Court should be reversed and the cause remanded.

EDWARD H. S. MARTIN,
GEORGE M. STEPHEN,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 124

THE A. J. PHILLIPS COMPANY, PLAINTIFF IN ERROR,

vs.

GRAND TRUNK WESTERN RAILWAY CO., ET AL., DEFENDANT IN ERROR.

ERROR TO UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

Brief for Defendant in Error.

L. C. STANLEY,
Attorney for Defendant in Error.

DETROIT:
CONWAY BRIEF CO., 143-149 LAFAYETTE BOULEVARD.
1914.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

A. J. PHILLIPS COMPANY,
Plaintiff in Error,
vs.
GRAND TRUNK WESTERN RY CO. et al.,
Defendants in Error.
124

IN ERROR TO THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

The statement of the facts and of the errors relied upon is satisfactory in the main, and except as hereinafter noted.

For convenience we give the order of events pertinent to the case:

April 15th, 1903, the advance of rates by the Southern Railroad Company, the Illinois Central and others.

April 29th, 1903 to August, 1904, the transportation of the lumber in this case.

July 24, 1903, petition of Central Yellow Pine Association to Interstate Commerce Commission to have the advance declared unreasonable.

February 7th, 1905, decision of Central Yellow Pine Association case. 10 I. C. C., p 505.

August 28th, 1906, Hepburn Act in force.

August 28th, 1907, expiration of time for proceedings for reparation under Hepburn Act.

February, 1907, decision in Abilene case.

May, 1909, commencement of Phillips case, which is more than six years after some of the lumber moved.

It is believed that the following, though strictly unnecessary for the determination of the demurrer, will yet show the true situation of the parties. The case was commenced against the two defendants in error who are parties to this Writ, jointed with the Southern Railway Company and the Illinois Central Railroad Company. The Southern Railroad Company was not served with process and did not appear. The Illinois Central Railroad Company was served with a process of disputed sufficiency but was, before the perfecting of this appeal, released from the case by agreement with the attorneys for Plaintiff in error. It is not shown and is not necessary to be shown whether the four carriers just now named are all who participated in the carriage of the lumber in this case. It is certain that no carrier earning the rates in question—that is, south of the Ohio River, is before the Court. Again, it is quite possible that if the Plaintiff in error paid the Detroit, Grand Haven & Milwaukee Railway Company the freight at the rates mentioned in the declaration, and made such payments as stated in the declaration on July 15th, 1904, that the portion thereof applying to the transportation south of the Ohio River was distributed to carriers south of the Ohio River before the beginning of this action.

BRIEF OF THE ARGUMENT

It is believed that all of the four groups of errors relied upon, as stated on page 3 of Brief of Plaintiff in error, may be condensed into one, or at least into the chief question, which is better stated in the same brief on page 2 (bottom)—that is to say, the question here is:

Can this Plaintiff in the suit commenced at the time and under the declaration which here appears, support its action as against this demurrer? In other words, is the averment of the declaration good upon demurrer in respect to the want of the proceedings before the Interstate Commerce Commission upon the shipments in this case, or by making reference to the shipments involved in the Central Yellow Pine Association proceeding?

We submit that the declaration does not state a case for the reasons following:

(1) The action of the Commission upon the shipments in question giving a reparation is a condition precedent to an action in Court, and that action must be by way of an order of the Court enforcing the order of reparation granted by the Court.

If this Honorable Court come to a different conclusion upon this point, then we submit:

(2) That the declaration does not sufficiently state the similarity and other controlling elements of the decision in the Central Yellow Pine Association case, to make the declaration good.

THE NECESSITY OF A PRELIMINARY PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION BY THE PLAINTIFF IN ERROR.

(3) It must be accepted now, as settled law, that the choice given to the shipper to sue before the Commission for a reparation, or to sue in the Courts under Section 9 of the Commerce Act, cannot consistently with the effectiveness of the Act, and therefore cannot consistently with the intention of Congress, be enjoyed in all matters of shipments.

While on the other hand it has been found that there may be such violations of the Act that the Courts may take jurisdiction and try them under the proofs that may be before the Court, including the matters of which the Court takes judicial notice. The existence of these two classes of actions is clearly set fort in the *National Pole Company vs. C. & N. W. Ry. Co.*, in 211 Federal, page 65.

The brief for the Plaintiff in error on page 4 admits this much, at least, that one of these two classes of cases requires some preliminary action on the part of the Interstate Commerce Commission, and that cases for damages arising from the existence of an unreasonable freight rate fall within that class.

So that the main question, as previously stated, turns upon the point whether the shipper thus suing in Court must have previously brought his own case to the attention of the Interstate Commerce Commission, or may plant his case upon a determination of the Commission made in the case of another shipper.

(1) The need of uniformity which was announced in the Abilene case (*T. & P. Ry. vs. Abilene Cotton, etc. Co.*, 204 U. S., 426) and in that line of cases, demands that all cases involving subjects comprised in the first case, shall first go before the Commission. This was the view taken by the Honorable Circuit Court of Appeals for the sixth circuit in this case when it was before them.

They said:

> "It is urged that under Section 9 Plaintiff was entitled to bring suit at any time within the limits of actions for debt. This limitation, of course, would be determined according to the statutes of the several states. Surely one feature of the intent of Congress in its enactment of the limitations in question was to establish uniformity in time as well as forum, in which such damages might be enforced. * * * To permit persons to maintain actions based upon orders of the Commission to recover damages for excessive rates within the varying periods fixed as to actions for debt would at once create confusion respecting the operation and affect all rate orders made by the Commission and obviously contravene the clearly defined policy of Congress." *Phillips vs. G. T. W. Ry.*, 195 Fed. 12.

(2) There is need of uniformity in the decisions as to the period to be covered by the judgment. In court this would be the period of the statute of limitations. While before the Commission the period would begin with the filing of a complaint to test the legality of the rate.

The Commission has ruled that it will not award damages by way of reparation based upon transportation during a time prior to the filing of the complaint in which the unreasonableness of the rate was decided.

Kindelon vs. So. Pac. R. R. Co., 17 I. C. C., p 251.

In that case Kindelon brought proceeding to have declared unreasonable a certain rate under which he had shipped hardwood, and asked for reparation. He based his complaint on a decision that the rate was unreasonable as found in *Burgess vs. Transcontinental Freight Bureau*,

13 I. C. C., 668, in which the complaint was filed June 28, 1907.

Kindelon's shipments were made after the filing of the Burgess complaint. The Commission held that while the Kindelon complaints were all filed within the two years' limit of time and cannot, therefore, be considered to have been filed out of time, yet—page 254—Kindelon stands in no better position than Burgess and should not be allowed reparation on shipments earlier than the earliest shipments upon which Burgess was allowed reparation, which was June 28th, 1907.

The Interstate Commerce Commission does not exercise the power in all cases, where the unreasonableness of rates is decided, to award reparation. The Commission did not award reparation in the Central Yellow Pine Association case, and if it had been petitioned by this Plaintiff in error, would not under its decision last cited, award any reparation for transportation prior to and this award was probably applied to all who proceeded before the Commission on the basis of the Yellow Pine decision. Whereas, the Plaintiff in error, by his declaration, seeks to recover on the basis of all shipments from as early as April 29th, 1903.

But if it were open to the Courts without to proceed independently and originally as to the merits of a particular shipper's claim, it is conceivable that a Court might find that an award was just where the Commission would refuse so to find. Moreover it must be remembered that there are two parties, sometimes the same party, to the shipment: unity might be lost again where the shipper recovers damages before the Commission, but the consumer might recover damages before the Court.

(3) There is need of uniformity in applying a rule of recovering reparation.

There are many Courts but only one Commission.

A plaintiff recovering in the court on a claim for reparation which the Commission would have rejected or has rejected, obtains a preference thereby. The courts have no rule on this particular, at least no one rule. But the Commission has a rule.

It seems to be the view of the Interstate Commerce Commission that a shipper not a party to proceedings before it to have rates declared unreasonable, but who asks for reparation on shipments in which was involved a rate de-

cleared unreasonable, is not entitled to recover where he shipped on a rate which is more than and includes the rate in question. That is to say, lumber rates terminating at Ohio River points were declared unreasonable. A shipper, therefore, who shipped lumber from Alabama points through the Ohio River point to points beyond cannot claim reparation under the Yellow Pine Association case, for the reason that his rate was not involved—see

Nicola, etc. vs. L. & N., 14 I. C. C., p. 199. See p. 207.

In that case the Commission said:

> "The three classes of persons concerned in refunds are:
>
> (1) The carrier, who is simply the stake holder bound to pay it over to the person entitled.
>
> (2) The vendor of the lumber, who is manufacturer or shipper or consignor.
>
> (3) The vendee, who is wholesale consumer or other consignee.
>
> The suggestions of these manufacturers or millmen, so far as applies to claims pending before the Commission, would if followed lead the Commission away from the direct results of the act of the carrier in the establishment, etc., of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells for the best price and the vendee buys at the lowest price possible while the transportation charges necessarily are among the controlling factors.
>
> To illustrate: A purchaser may buy three carloads of lumber at a shipping point in Georgia all of the same grade and value. The price is agreed upon, being fixed by all considerations that affect it including the freight charges which must of necessity be paid by the purchaser if he ships the lumber. One of the three cars is shipped to the Ohio River point. Another is shipped to Pittsburgh or some eastern point, while the third is re-sold at the mill where it was first purchased. The vendor has received the same price for each of these car loads. There can be no question of refund in respect to the one which was not shipped but sold on the spot, nor should there be any question as to refund under the proceedings herein referred to on the one that was shipped to the east because those rates were not involved. But there is a refund of 2c per hundred

pounds due on the one shipped to the Ohio River Point."

To apply this, the rate to Fenton while it includes the rate to the Ohio River point, was not before the Commission and was not declared to be unreasonable. Therefore, one who claims to have suffered by that rate merely because it included the rate to Ohio River, cannot recover reparation on the facts stated. It may be that one of the reasons is that the inequality south of the river was compensated for in the rate for the balance of the haul.

The published tariff, so long as it is in force, has the effect of a statute and is binding alike on the carrier and on the shipper.

Penn. R. R. Co. vs. International Coal Co., 230 U. S., p. 184.

(4) There is need of unity of forum to prevent double recovery.

The consignor might sue in court. The consignee might proceed before the Commission.

The Commission might find that the real injury was suffered by the consumer who paid the freight as a part of the purchase price.

If the plaintiff were required to bring an order giving him reparation, justice would be promoted because of the universal jurisdiction of the Commission.

(5) The remedy in the courts is impracticable and inconsistent with the remedy before the Commission.

Unless the plaintiff has an order of reparation and findings from the Commission, the court has nothing before it as evidence of unreasonableness. It must pursue an independent investigation and reach, perhaps and probably, a different conclusion from that reached by the Commission in another shipper's case.

Van Patten vs. C. M. & St. P. 81 Fed., 545.

LEHIGH VALLEY VS. MEEKER.

We cite *Lehigh Valley R. R. vs. Meeker,* the decision of the Circuit Court of Appeals of the 3d Circuit, 211 Federal, 785. Since we believe that case will aid in the decision of the instant case, we submit a brief analysis of the facts and of the matters decided.

It was the action by Meeker, under Section 16, to recover for certain acts and practices of the Railroad Company which had been the subject of complaint by the same plaintiff before the Interstate Commerce Commission. From the fact just stated, therefore, it has not the controlling effect which one Court would have upon another or coordinate or inferior jurisdiction. The complaint was, in essence, that the tariff rates were unreasonably high. That they were paid under protest and that damage to the plaintiff resulted. His complaint showed also that he had applied to the Interstate Commerce Commission and that they had made a decision rendering him a sum of money by way of damages or reparation.

The Commission had also made certain findings. The Commission claimed that these findings were findings of fact as required by statute, section 14, and that they were prima facie evidence of the facts stated therein. But the sufficiency of these findings for the purpose of being used for the prima facie evidence was disputed by the Carriers. The decision of the Court was rendered by Mr. Justice Gray. In this opinion he says, page 797, referring to the findings made by the Commission and offered as prima facie evidence:

> "Such finding of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report * * * In the said original report there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage. * * * The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. It is quite conceivable, however, in the performance of its administrative function, the Commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it.

> The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.
>
> The contention of the plaintiff, sanctioned by the Court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the Commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a prima facie case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages. * * *
>
> It can hardly be denied that such instructions were not only due from the Court to the jury, but that without them, these papers, including this voluminous report of the Commission, which in itself constituted a fair sized book, should not have been admitted."

Since Meeker did go to the Commission for a preliminary finding his case is, of course, essentially dissimilar from the instant case and on that record the Court could not decide the question involved in the instant case. But it is cited to show the intention of the statute.

As to all matters involving the administrative opinion of the Commission, we say that this intention is that to succeed in a suit in Court, the shipper, as plaintiff, must be provided with a statement of facts in his own case. Otherwise, the Court is put in the same position where the Interstate Commerce Commission was put by the filing of the original petition before the Commission, namely, the investigation of the entire subject of the unreasonableness of rates. Because, and unless the prima facie proof consisting of this statement of facts in the shipper's own case shall be presented to the Court, the decision of the Commission made in another shipper's case, is not controlling upon the Court. The trial court would then be concerned with the difficulty that the matters presented were not

for the cognizance of the Court—that there was a separate body organized to take cognizance of these matters and that Congress did not intend that the Court should be engaged with an investigation involving such difficult subjects. While at the same time it had no judicial knowledge that the matter had been passed on by the Commission.

The case in hand shows that the unity of decision demanded by the Supreme Court in the Abilene case will be lost, if the views of the plaintiff in error shall prevail.

Returning to the Meeker case, there was a second complaint, similar in its nature, but involving shipments of a different period. The decision dealt with both these complaints. On page 802 of the decision, the Circuit Court of Appeals held:

> "The manifest intention of Congress here, as in all statutes of limitation, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the Act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only that they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amenging act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905, or two years before his complaint."

On re-hearing, page 804, the Circuit Court of Appeals said:

> "A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the Commission, in the performance of its administrative function, to be unreasonable, differs essentially from a situation where an illegal rate is, in the first instance, coerced or extorted by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second. That section 22 does not help the argument of the defendant in error in this respect, is shown by Mr. Justice White, when he further says:
>
> 'It is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce, viz., "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.'
>
> We repeat that this decision of the Supreme Court so far from sustaining the contention of the defendant in error, that the Interstate Commerce Act was merely declaratory of the common law, and that the common law measure of damage was applicable to the liability created by Section 8 of the act, clearly distinguishes the liability at common law, as it existed in the cases cited by Mr. Justice White, from that created by the act for every violation of its provisions."

On page 806 of the decision, it follows the decision of Justice Lamar in the International Coal Company above cited where it says:

> "It would seem that all other shippers than the complainant may bring their several actions in the District Court for the full amount of damages sustained in consequence of a similar violation of the Act, without any further finding by the Commission."

But we say here again that Meeker, having proceeded before the Commission, as to matters involved in his second complaint, the decision as to his second complaint is no more binding upon any Court in deciding the instant case. The question was not presented in the Meeker case as to whether a plaintiff who had not presented his case to the Commission might sue in the Courts.

On page 807, the opinion in the Meeker case says—after quoting from the portion of the decision in the Supreme Court in the International Coal Mining case:

> "This statement of the Supreme Court is general, and is applicable to any and all cases where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the Court below, that 'the shipper was entitled as a matter of law to recover the difference between the two rates,' that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the Commission. Herein is the essential vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is matter of law, and not of fact to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the Commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only prima facie evidence of the liability of defendant for the amount so awarded. The act makes nothing prima facie evidence of the liability created by Section 8. The prima facie mentioned in Section 16 is attached to the facts stated in the finding and order of the Commission, which facts may or may not be sufficient to establish that liability."

Also the successive amendments by which Section 16 was brought into its present shape, says:

> "Suits to enforce the liability created by Section 8 were made available to the person injured in all

cases, not only where the violation of the statute was an act or practice denounced as illegal by the law itself, but also where such act or practice was only made illegal by the finding of the Commission.

Sections 13 and 15 having provided that the Commission was authorized * * * to declare, upon investigation, any rates or practices unjust or unreasonable, section 16 provided for a case where, after the complaint and investigation, an award, or, as it was called in the original act, a recommendation, of damages was made by the Commission. If not complied with by the defendant within a time specified, the complainant was authorized to file in a Circuit (District) Court of the United States, or in any state court of general jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. 'Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages.' This is in effect authorizing in the special case described a common law suit for damages, as contemplated by Sections 8 and 9, in all cases where damages are claimed consequent upon a violation of the law."

(6) In cases of that class or nature which requires the administrative action of the Commission, no primary or independent action of the courts is possible.

We submit that the Commerce Act took away the primary or independent right of this plaintiff to sue originally in the Courts.

Franklin et al. vs. Philadelphia Etc. Ry. Co. 203 Fed. Rep. page 134, opinion of Thompson, District Judge.

Morrisdale Coal Company vs. Pennsylvania Ry. Co. 183 Fed. 929. C. C. A. Third Circuit.

Howard Supply Co. vs. C. & O. Ry. 162 Fed. 188, opinion by Keller, District Judge.

For convenience, we submit brief abstracts of the cases on which we rely. Also, abstracts of some of those cited by plaintiff in error.

FRANKLIN ET AL. VS. PHILADELPHIA ETC. RY. CO. 203 FED. REP. PAGE 134.

This was an action to recover damages for the excess of freight charges paid to the defendant on ice shipped from interior points in Pennsylvania to Philadelphia during the period from April 18th, 1907, to Aug. 20th, 1909; the excessive rate complained of was $1.40 per ton.

It appears that this rate had been held unreasonable by the Interstate Commerce Commission on Nov. 14th, 1910, in a proceeding brought by the Mountain Ice Company, which was the plaintiff's consignor, et al., against the defendant railroad company, et al. But the plaintiffs were not parties to that proceeding. It appears, page 135 (bottom), that the rates found unreasonable by the Commission were the identical rates charged to the plaintiffs and by them complained of in this suit.

The question, therefore, was squarely presented whether a suit may be brought based upon an order of the Interstate Commerce Commission made in the proceedings brought by the Mountain Ice Company, to which the plaintiffs were not parties and in which no award was made to them.

Judge Thompson cites various decisions. He bases his opinion on the following:

> *T. & P. Ry. Co. vs. Abilene Oil Etc. Co.* 204 U. S. 426, where it was said:
>
> "The independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violation of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of."

Also

> "Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct, not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in

whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission."

Also from *Morrisdale Coal Co. vs. Pennsylvania R. R. Co.* 183 Fed. 929, where the following language was used:

> "If, except for the act to regulate commerce the Morrisdale Coal Company would have had a common-law right of action against the Pennsylvania Railroad Company for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time, and the Coal Company given a substituted right of procedure before the Commission, at any time within one year after June 29, 1906, etc."

Judge Thompson interpreted Judge Lanning's opinion in the Morrisdale Coal Company case as follows:

> "That if the question involved were one of rates, and the damages claimed would be the result of a mere mathematical calculation, recourse must be had to the Commission, not only to pass upon the question of the unreasonableness of rates, but to award damages, if any were found to have arisen."

Also *Jacoby vs. Penn. R. R. Co.* 200 Fed. 989, where in a case involving discriminatory practice of a carrier in the distribution of coal cars the following language was used:

> "It may be stated as established that the act to regulate commerce was intended by Congress to afford an effective and comprehensive means for redressing wrongs resulting from unjust discriminations and undue preference by carriers, and that a shipper cannot maintain an action at common law for damages arising from such wrong, but must first make his complaint to the Interstate Commerce Commission; in other words, his common-law remedy is abrogated by the procedure established by the act to regulate commerce. It was the evident intent of Congress that the procedure established by the act should be substituted for that which had heretofore obtained at common law."

Judge Thompson held that the plaintiffs had elected which one of the two methods provided for by the Statute they would adopt.

"If the action is intended under Section 9 as a 'suit in his or their own behalf for the recovery of the damage for which such common carrier may be liable under the provisions of the Act,' I think their action must fall, because it is not, in the language of the court in the Abilene Oil Co. case, 'confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission.' If they have chosen the procedure outlined in the act, they are outside of its provisions, because they have not, in the language of Section 9, made 'complaint to the Commission as hereinafter provided for.'"

He held further that "Excepting the right to bring an original action in the courts, which is limited under the decision in the Abilene case to those cases which require no previous action by the Commission, the only remedy provided for the recovery of money damages of the character demanded in this suit is under the provisions of Section 16, which provides, as a prerequisite to suit, a determination by the Commission that the 'party complainant is entitled to an award of damages under the provisions of this act for a violation thereof,' in which case it is provided that the 'Commission shall make an order directing the Carrier to pay to the complainant the sum to which he is entitled on or before a day named.'"

Section 16 then provides that, upon the noncompliance with an order for payment of money, suit may be brought in the Circuit Court by "petition setting forth briefly the causes for which the claims, damages and the order of the Commission in the premises," which findings and order of the Commission are made prima facie evidence of the facts therein stated.

Further, "It is apparent, therefore, from the language of the act, that, where proceedings have been had by complaint before the Commission, a suit for the recovery of damages must be based upon an order of the Commission for the payment of money."

Cited also are *Robinson vs. B. & O.* 222 U. S. 506, and *National Pole Company vs. N. W. Ry. Co.* 230 Fed. 185, *Howard Supply Co. vs. C. & O. Ry. Co.* 162 Fed. 188.

MORRISDALE COAL COMPANY VS. PENNSYLVANIA RAILROAD COMPANY, 230 U. S., PAGE 304.

In this case the coal company brought suit in 1908 against the railroad company for damages alleged to have been occasioned by an unfair distribution of coal cars and an undue allotment of cars to its competitor, the Berwind-White Company, in the years 1900 to 1905.

No preliminary proceeding was had before the Interstate Commerce Commission but the questions laid before the court in the suit were as to the counting or not counting of private cars owned by the shippers and also the cars owned by the railroad company for its own fuel.

It appeared however that during the times of the alleged discrimination no general ruling had been adopted by the carriers or promulgated by the commission. This court said in its opinion, written by Mr. Justice Lamar:

> "As late as 1910, it was said (19 I. C. C. Rep., 387), that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time, will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. *Tracy vs. Chicago etc., R. R.*, 13 I. C. C. Rep., 451; *Hillsdale Coal Co. vs. Pennsylvania R. R.*, 19 I. C. C. Rep., 356, 372; *Jacoby vs. Pennsylvania R. R.*, 19 I. C. C. Rep., 392; *Minds vs. Pennsylvania R. R.*, 20 I. C. C. Rep., 52. (Page 312.)"

The Circuit Court dismissed the case on the ground that without preliminary action by the Commission the court had no jurisdiction of a suit for damages alleged to be occasioned by an undue discrimination against the plaintiff and undue preference in favor of the competitor.

The Supreme Court of the United States affirmed the judgment on the same ground. The brief for the Morris-

dale Coal Company advanced the argument that the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling as to whether the method adopted by the Pennsylvania Railroad was not during the years 1900 to 1906, unjustly discriminatory. The decision in *Southern Ry. vs. Tift,* 206 U. S., 428, was used to support that suggestion. But the Supreme Court said that in the Tift case:

> "The statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case (Morrisdale case), the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to Dec. 13, 1915. The suit was brought July 17, 1908, more than two and a half years later and after the passage of the Act of June 29, 1906, 34 Stat. 584, 590, c. 3591."

Before the Morrisdale suit was begun but after the transactions involved in it, that is to say in July 1907, the Interstate Commerce Commission decided the case of *Railroad Commission of Ohio vs. Hocking Valley R. R. Co.,* 12 I. C. C. Rep., 398. In that decision the Commission lays down the rule of car distribution including the reckoning of the private cars and the foreign company fuel cars.

We submit that if a general ruling in a different party's case would have been sufficient as a prerequisite to the Morrisdale suit in Court it was supplied by the decision of the Hocking Valley case by the Commission.

HOWARD SUPPLY CO. VS. C. & O. RY. CO. 162 FED. 188.

Opinion by Keller, District Judge. Suit by the Howard Supply Co. to recover overcharges of freight on shipments of ties for the reason that the published schedule rates of the defendant were higher than the rate on rough lumber when under the rulings of the Interstate Commerce Commission ties and rough lumber should be classified alike and the same rate charged. The period of shipment was from May, 1904, to Dec., 1906. The tariffs were published and filed and not passed upon nor changed by the Commission. They showed a rate of seventeen cents on ties and fourteen cents on sawed lumber. The Commission never decided as to the right of the plaintiff or other

shippers between the points in question to have ties shipped at the lumber rate of fourteen cents nor was the seventeen-cent rate declared unjust or unreasonable by the Commission.

But it appears that the Commission did decide in the case of *Reynolds vs. Western N. Y. Etc. R. R.*, I. C. Rep. 685, that rough lumber and railroad ties should be classified alike and that any charge upon ties greater than that charged for rough lumber between the same points was in that case excessive and unreasonable. The plaintiff contended that the decision of the Commission above referred to, although not between the same parties, gave the court jurisdiction to award reparation by damages.

Held as follows:

> "I entertain no doubt but that a party aggrieved by the enforcement against his protest of a published rate believed by such party to be unreasonable must, as a preliminary to a suit at law for damage, obtain a finding from the Interstate Commerce Commission of the unreasonableness of the rate, *and an award of reparation* 'because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier, and before its change and the establishment of a new one.'"

Citing *Southern Ry. vs. Tift*, 206 U. S. 439:

> "This being my view it follows that this Court has no jurisdiction of this action."

We cite and abstract the following:

TEXAS & PAC. RY. CO. VS. AMERICAN TIE & TIMBER CO., 34 SUP. CT. REP., PAGE 885.

The Timber Co. sued the Railway Company above named, and the Kansas City Southern Ry. Co. to recover damages based on refusal to furnish cars for the loading of ties at points in Arkansas and Louisiana for shipment to a point in Kansas beyond their lines. The Kansas City Southern pleaded to the jurisdiction and suit against it was dismissed. Judgment was obtained against the Texas and Pacific. This was affirmed in the Court of Appeals.

See 111 C. C. A. 673, 190 Fed. 1022.

The Railway Co. had moved to dismiss the case on the ground that the Court had no jurisdiction to decide the subject matter.

The ties were for shipment to the Union Pacific Ry. Co. at Linwood, Kan. The cars were refused by the T. & P. Ry. Co. for the reason that it had no "through" rate on oak railway ties from its points to Linwood, Kan. The petition charged that the joint "through" lumber tariff and the rate of twenty-four cents previously charged on the similiar ties by the T. & P. under that tariff established the applicability of it to the ties and established the unreasonable refusal of the Company. Alleged that the motive of the T. & P. R. Co. was that it wanted the ties on its own line. It seems that a tariff applying to ties became effective Feb. 13th, 1908.

But the Railway Company also insisted under Section 9 that the Timber Co. could not prosecute its action in the Courts because by making a complaint, as had been done before that time to the Interstate Commerce Commission it had elected to proceed before the Commission. The Tie Company had filed an informal complaint with the Commission on the ground that although the Railway Company's tariff on lumber embraced ties the Railway Co. had announced an intention not to receive ties under the schedule and this informal application protested in advance against a permission of the Railway Co. to file a specific tariff on ties at fifty cents per cwt. because as compared with the twenty-four cent per cwt. rate it would be unreasonable and it seems that then the Railway Co. applied to the Commission to be allowed to put into effect a cross-tie rate of twenty-four cents, which request was refused, then the Railway Co. requested permission to put in a twenty-four cent rate after five days notice. This was refused; then the Railway Co. requested permission to put "through" tariff amended so as to include in the lumber rate wooden ties, and this Tariff became effective Feb. 13th, 1908.

Held: The evidence before the trial court showed a contract with the Union Pacific to deliver the ties and the resulting cancellation of that contract by the Union Pacific and loss to the Tie Company. The joint "through" lumber tariff of the Company showed a twenty-four cent rate on oak lumber without mentioning ties.

Held: The pivotal question is whether oak ties are included in the "through" lumber rate of twenty-four cents, as to which lumbermen witnesses did not by any means agree.

Held: "It is equally clear that the controversy as to whether the lumber tariff included cross-ties was one pri-

marily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the Statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come with the jurisdiction of the Commission." Citing *T. & P. R. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9. *B. & O. R. Co. vs. U. S.*, 215 U. S. 481; *Robinson vs. B. & O. R. Co.*, 222 U. S. 506; *Mitchell Coal & Coke Co. vs. Pennsylvania R. Co.*, 230 U. S. 247; *Morrisdale Coal Co. vs. Pennsylvania R. Co.*, 230 U. S. 304.

The Timber Co. urged:

(a) That the above doctrine is based on the insisting of a uniform enforcement of the Commerce Act requiring the Commission to determine originally the matters which were in their jurisdiction, but that the necessity of a preliminary inquiry ceases when the necessity ceases for solving the question and it is very clear that oak cross-ties were included in the lumber rate without need of inquiring of the Commission about it, but

Held: That the great conflict among witnesses and the decision by the Court in the Kansas City Southern case, 175 Fed. 28 and 33, and a similiar decision in the Greason case, 112 Mo. App. 116, both decisions being to the effect that cross-ties were not lumber show the necessity of a determination by the Commission.

The Timber Co. also urged:

(b) That the Commission had determined the question in *Reynolds vs. Western New York, etc.*, 1 I. C. C. 393, but

Held: "An examination of that report, however, discloses that the Railway Co. had in effect a published rate on cross-ties by that name and the complaint was that it was unreasonable because it was higher than the rate of lumber. The ruling of the Commission was not that the Lumber rate included a rate on ties, but that the rate on ties was unreasonable as compared with the lumber rate and should be reduced. It was also urged by the Timber Co.,

(c) That the Railway Co. by carrying three cars of ties under the twenty-four cent lumber rate had conclu-

sively recognized the applicability of the lumber rate of ties, but

Held: The proposition is wanting in merit for this obvious reason: "If, as we have seen, the question of whether cross-ties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Interstate Commerce Commission, the situation was that the railway company could not do by indirection that which the statute permitted it to do only by compliance wih the law; that is, filing its traiffs in the regular way. Nothing could better serve to demonstrate this self-evident truth than by recurring to the fact that, at the very inception of the controversy the request made by the railway company to the Interstate Commerce Commission to be allowed to immediately put in the rate on cross-ties was refused by that body."

THE MITCHELL COAL & COKE CO. VS. THE PENN. RAILROAD, 230 U. S., PAGE 247.

This case is relied upon by the plaintiff in error as authority for the proposition that a shipper suing in Court for damages by reason of having paid an unreasonable rate, may maintain his suit by reason of the fact that some other shipper had in due time applied to the Commission for an award of reparation based upon the unreasonableness of the rate as found by the Commission. But we submit that the proposition just stated is not the basis of the decision—it was not necessary to the decision. It is an *obiter* statement of Mr. Justice Lamar made in the course of a decision which he rendered in behalf of the Court. In the Mitchell case the jurisdictional question was decided to be:

> "Has the Circuit Court of the United States in advance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain a question of trespass brought by a shipper of coal and coke to recover damages because of alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rate, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in mak-

ing the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof."

The opinion contained the following:

"To say the least, it is extremely doubtful whether at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to (and by) the carrier. But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or as undue preference. Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order." Page 258.

But the legal effect of the decision was that the suit could not be maintained because it involved a question which was within the administrative jurisdiction of the Commission solely. But in that case there was no pretence that the decision of the Commission had been sought by any shipper, whether plaintiff or any other shipper so the Court was not called upon to declare what would be the award or procedure in case another shipper, not the plaintiff, had sought and obtained the necessary preliminary ruling from the Commission. In fact, the Supreme Court ordered the suit to be held in abeyance until plaintiff should have an opportunity to go before the Commission. We submit, therefore, that the Court not having had argument upon the question in the instant case, and whether or not argument was had, the Court not being under the necessity of deciding the question in the Mitchell case, that the decision in the Mitchell Coal Co. should not be treated as binding upon litigants who have the instant question to deal with and who are not represented in that case.

The decision of the Mitchell Coal case was based upon the decision of the Supreme Court of the U. S. in the case of the *Penn. Railroad Company vs. The International Coal Co., etc.*, 230 U. S., page 184, but that case, in turn, does

not present the crucial question which is contained in the instant case. It was a case like that of the Mitchell Coal Company, and it held that the Interstate Commerce Commission need not be first appealed to to declare that a plain giving of rebates was unlawful; that such a question was not within the administrative powers of the Commission to the exclusion of the powers of a Court at law, which had the power to declare a rebate to be unlawful, when proven in evidence, and to assess damages against the shipper discriminated against.

Turning to that case we find on page 97 the following:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate. Neither could it claim that it had charged too little and insist upon a larger sum being paid by the shipper (citing statutes). The tariff so long as it was of force was in this respect to be treated as though it was a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.
>
> "In view of this interpretative obligation to charge, collect and retain the sum named in the tariff there was no call for the exercise of a rate regulating discretion of an administrative body to decide whether the carrier should make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected, was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the Court without administrative ruling or reparation order could apply the fixed law to the established fact that a carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure from the published tariff was forbidden and section 8 (24 stat. 382), expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby, etc.'"

Thus we see that *Pennsylvania R. R. Co vs. The International Coal Co.*, 230 U. S., 184, is no authority for the

proposition advanced by the plaintiff in error in the instant case.

The plaintiff in error cites the *National Pole Co. vs. C. & N. W. Ry. Co.* the decision of the Circuit Court of Appeals, 7th Circuit 211 Fed., p 65. In that case the question of reasonableness concerned a tariff offering certain transportation privileges at a through rate, provided the ultimate destination should be shown on the shipping bills issued at the point of origin.

The Circuit Court of Appeals by its decision held that the reasonableness of this provision, when once decided by the Commission in any case might be taken advantage of by another shipper, without himself going before the Commission. But the Circuit Court of Appeals found some support in the decision of the Supreme Court of the U. S. in the Mitchell Coal Co., 230 U. S., page 247.

But we submit that analysis of the Mitchell Coal Co. and the National Pole Co. cases show that they do not involve cases at all similar.

BALTIMORE & OHIO RAILROAD COMPANY VS. UNITED STATES EX. REL., PITCAIRN COAL COMPANY, 215 U. S., PAGE 481.

Decision by Mr. Justice White.

This was a petition for mandamus to compel the carrier to alter its plan for the distribution of coal cars among a group of mines.

It appears (see page 95), that the Interstate Commerce Commission had previously dealt with the question on the petition of the *Rail & River Coal Co. vs. B. & O. R. R. Co.* (14 I. C. C. Rep. 94). The court uses the illustration of a regulation of a carrier assailed as unjustly discriminatory and the court finds the complaint to be well founded and supposes that in a like case, the administrative powers of the commission are invoked.

> "The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalance of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed.

> On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but etc."

ROBINSON VS. BALTIMORE AND OHIO RAILROAD CO., 222 U. S., PAGE 506.

A published tariff in this case showed a rate of fifty cents higher per ton for coal loaded into a car from wagons than when loaded from the tipple. Robinson commenced his action in a county court of West Virginia. The case was heard upon an agreed statement of facts.

> "But the statement did not disclose, or even suggest, that the schedule had been the subject of a complaint to the Interstate Commerce Commission or had been found by the Commission to be unjustly discriminatory, or that the railroad company had been ordered by the Commission to desist from giving effect to the schedule or to make reparation to Robinson or any other shipper because of prior exactions thereunder."

The action was dismissed in the county court. This judgment was affirmed by the Circuit Court of Appeals of the state. Writ of error was taken to the U. S. Supreme Court where the opinion of the court was rendered by Mr. Justice Van Devanter.

The deficiencies in the statement of facts on which the action was founded were pointed out by Mr. Justice Van Devanter in his opinion in the words quoted above.

The opinion says further, on page 508:

> "The first question to be considered is, whether, consistently with the provisions of that act, Robinson could maintain his action for reparation in the absence of an order by the Interstate Commerce Commission finding that the established schedule whereby the additional fifty cents per ton was exacted was unjustly discriminatory, *determining what reparation should be made* because of prior exactions thereunder, and directing the carrier to desist from such discriminations in the future, *and to make the reparation indicated.*"

The opinion further says on page 509, referring to the function of the Commission in preventing discrimination under the act:

> "The matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any non-conformity to those standards by (a) an appropriate change in schedules; and (b) by due reparation to injured persons."

(We have inserted the letters "a" and "b.")

Again on page 509:

> "It is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule * * *."

It was contended by Robinson that the Interstate Commerce Commission had rendered the requisite decision in *Glade Coal Co. vs. Baltimore & Ohio Railroad Co.*, 10 I. C. C., page 226, although he had failed to mention the case in his pleadings or agreed statement of facts. The court, after stating that the opinion should have been pleaded, says, page 512:

> "The result, however, would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did not find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here."

We cite this case as showing that in the opinion of the Supreme Court of the United States, the condition precedent to an independent suit for damage by way of reparation consists of two things: a prior order of the Inter-

state Commerce Commission (a) containing the rate whose illegality is the foundation of the action, and (b) ordering reparation therefor.

In other words, it is the view of the court that reparation is not due in all cases where a rate has been exacted that is subsequently found to be illegal, and therefore the plaintiff must come provided with an order showing that he is entitled to such reparation.

VAN PATTEN VS. CHICAGO, M. & ST. P. RY. CO., 81 FED., R. P. 545.

Decision by Shiras, District Judge, upon a Demurrer to Answer.

The case was a petition alleging unreasonable rate on a shipment of coal and wheat and claiming damages.

The decision was that the published tariff, so long as it remained in force, was the standard for ascertaining what was a reasonable rate. In reaching that decision, the Court said (page 551):

> "In the present case, however, the proposition of the plaintiff is that, after the carrier, in obedience to the requirements of the act, has adopted, printed and posted a schedule of rates, and for the past five years has received and transported grain, charging the schedule rates therefor, and the shipper, without protest or demur, has delivered his grain for shipment, knowing the schedule rate, and has paid the charges in conformity with the established rate, he may now, and at any time within the period of the statute of limitations, bring an action at law for damages, not on the ground that more than the schedule rate was exacted, or that the schedule itself provided for unequal and therefore unjust, rates, but solely upon the ground that the schedule rates, though uniform, and properly proportioned, were greater than they should have been; and thus the question is presented whether the interstate commerce act, considered as a whole, authorizes and provides for an action of this kind. If it can be maintained, it results in the holding that it was the intent of Congress to place upon the courts and juries of the country the duty and burden of establishing the rates of transportation for interstate commerce, and upon the common carrier the burden

of transportation, with the right to ultimately retain as pay therefor the rate fixed by the verdict of a jury rendered perhaps five years after the rendition of the services. How is it possible for a jury to pass understandingly upon the questions which inhere in the establishment of a properly proportioned and equalized schedule of transportation rates? Take this case as an axample. As already stated, the petition contains 23 counts, etc."

Plaintiff in error cites *Baer Bros. vs. Denver & R. Co.* An examination of it follows.

BAER BROS., ETC., VS. DENVER & R. G. R. R. CO., 34 SUP. C. T. REP., PAGE 641.

Through shipments move from St. Louis to Leadville by what was held to be an arrangement for through transportation, though that performed by the defendant was between two points in the State of Colorado on a rate of forty-five cents per cwt., being the local rate. The shipper brought suit in the United States Court in Colorado against the defendant and the other carrier to recover the excess of the said forty-five cent rate claimed to be unreasonable over a reasonable rate. Voluntarily dismissed. Then a proceeding before the Commerce Commission asking to have the ninety cent rate held unreasonable and reparation. Here it was admitted that the other carriers rate of forty-five cents, Mo. Pac., was unreasonable. It was found and held that the defendant's rate was unreasonable to the extent of fifteen cents and the Commission made an order of reparation. Payment refused. Suit to enforce it in U. S. Court of Colorado.

Held: Lamar Justice, The order of the Commission might and should contain a provision making a future rate, but the omission so to do does not render void its finding of an unreasonable rate in the past nor of a reparation founded thereon, otherwise the shipper might be punished by this failure since it would deprive him of his private damages, because of the Commission's failure to make a future public rate. This petition asked for reparation and for the establishment of just rates. The plaintiff should not be deprived of his damages for the past for the reason that the carriers agreed upon a new through rate and thus avoided the establishment of one by the Commission.

" 'The report and order gave the plaintiff no preference over other shippers since they showed that

> fifteen cents of the rate charged by the defendant was unreasonable. If such a finding of unreasonableness was not sufficient generally to inure to the benefit of all other shippers they could on application have secured such a modification as to enable them to maintain a suit for the recovery of damages for unjust charges and collections in the past.' "

But the Baer Bros. case cannot be said to have decided a case where the plaintiff had not gone before the Commission because in the Baer case the plaintiff had gone before the Commission.

STATUTE OF LIMITATIONS.

The brief for plaintiff in error points out that we have not pleaded this statute.

Under Michigan practice as followed in the United States Courts in Michigan, such pleas may be filed after the decision on the demurrer. This applies to the time for bringing suit.

But we submit that any limitation for bringing a complaint to the Commission is included in the demurrer which is based on the want of such a proceeding. In other words the damurrer is not weakened by the fact, if it be a fact, that such proceeding is now impossible.

Wherefore we submit:

That the declaration failed to state a preliminary proceeding by the plaintiff before the Interstate Commerce Commission and for that reason was demurrable. That the demurrer was properly sustained and the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully,

L. C. STANLEY,

Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1008.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, AND AUGUSTUS W. BOGGS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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A. J. PHILLIPS COMPANY *v.* GRAND TRUNK WESTERN RAILWAY CO.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 124. Argued January 15, 1915.—Decided March 15, 1915.

A finding by the Interstate Commerce Commission in a general investigation that an advance in a rate on a specified commodity between specified points is unreasonable inures to the benefit of every shipper who has paid the unjust rate, provided however, that he asserts his claim against the carrier within the time fixed by law.

A shipper who paid charges prior to the passage of the Hepburn Act and did not commence proceedings until more than one year after the passage of that act cannot recover on the strength of a finding of the Interstate Commerce Commission made in a general proceeding to which he was not a party that the rate paid was unreasonable.

The Conformity Act (Rev. Stat. 914) does not apply to a state rule of practice prohibiting taking advantage of the statute of limitations by general demurrer to a cause arising under a Federal statute expressly limiting the time within which the right created by the statute can be asserted—in which case the lapse of time not only bars the remedy but destroys the liability.

The prohibitions of the Interstate Commerce Act against unjust discriminations relate not only to inequality of facilities but also to giving preferences by means of consent judgments or waivers of defenses open to the carrier.

Quære, whether connecting carriers participating in a haul, the advanced

rate for which was held by the Commission to be excessive but who were not responsible for advancing the rate, could be held jointly and severally responsible for reparation before they had been heard by the Commission.

The facts, which involve the right of a shipper to recover from the carrier freight charges held to have been unreasonable by the Interstate Commerce Commission and the provisions in the Hepburn Act limiting the time within which claims of that nature can be asserted, are stated in the opinion.

Mr. Edward H. S. Martin and *Mr. George M. Stephen* for plaintiff in error.

Mr. L. C. Stanley for defendants in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The A. J. Phillips Company is a manufacturer of doors at Fenton, Michigan. For use in its business it purchased large quantities of lumber, much of which was shipped from points in Alabama, over the lines of the Illinois Central, the Southern, the Grand Trunk Western, and the Detroit & Milwaukee Railway Companies. Prior to April, 1903, the rate to Fenton was 28 cents a hundred,—of which 14 cents was the charge for the haul, over the Southern and the Illinois Central, from Alabama points to the Ohio River. The remaining 14 cents represented the charge of the Grand Trunk and the Detroit Companies for the haul from the Ohio River to Fenton.

In April, 1903, the Illinois Central, the Southern Railway, and other carriers operating in the Gulf States, filed a tariff which made an advance of 2 cents per hundred on lumber shipped from Alabama mills to the Ohio River and beyond.

On July 24, 1903, the Yellow Pine Association filed a complaint with the Interstate Commerce Commission seeking to have this increase declared to be unreasonable.

After a hearing the Commission held (10 I. C. C. 505–547) that "the advance of 2 cents was not warranted under all the facts and evidence and that the resultant increased rate is unreasonable and unjust. An order will be issued in accordance with these views." The carriers sought to have this order enjoined, but the action of the Commission was sustained by the Circuit Court and, on May 27, 1907, that ruling was affirmed by the Supreme Court of the United States (206 U. S. 441)—After which—as appears from the official reports (*Joyce* v. *Ill. Cent. R. R.*, 15 I. C. C. 239)—the Commission approved the settlement of a number of claims for reparation which had been previously filed. The Phillips Company was not a party to the proceedings before the Commission and made no claim for reparation but on May 11, 1909, it brought suit in the Circuit Court of the United States for the Eastern District of Michigan, against the four carriers named above, for the recovery of the overcharge. The declaration,—which by reference, made the report of the Commission in 10 I. C. C. 505 a part of the pleading (*Robinson* v. *B. & O. R. R.*, 222 U. S. 507)—alleged that the four carriers had charged plaintiff 30 cents per hundred though they well knew that 28 cents was the highest just and reasonable freight rate that could be charged on lumber and that anything in excess of 28 cents was illegal, unjust and excessive. It was also averred that the Commission on the complaint of the Yellow Pine Association had found the 2 cent advance to be unreasonable, and for that reason the plaintiff claimed that the defendant-carriers were each and all bound to return to it the 2 cent overcharge on 218 cars of lumber. There was a prayer for judgment for $5,000 damages and $2,000 attorney's fees.

The Southern Railway was not served. The Illinois Central having no office in the district was ultimately dismissed from the case. The demurrer of the other two

defendants was sustained. That judgment was affirmed by the Circuit Court of Appeals, and the case brought here by writ of error.

1. The Phillips Company, relying on a finding by the Commission on the complaint of the Yellow Pine Association, that a 2 cents advance in a lumber rate was unreasonable, brought suit against four carriers to recover an overcharge collected on 90,432,500 pounds of lumber shipped to it over their connecting lines. But as the plaintiff was not a party before the Commission the defendants insist that it cannot take advantage of the order that the rate was unjust, so as to be able to maintain the present suit.

But the proceeding before the Commission, to determine the reasonableness of the 2 cents advance, was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order. See *Abilene Case*, 204 U. S. 446; *Robinson* v. *B. & O.*, 222 U. S. 507; *Baer Bros.* v. *Denver &c.*, 233 U. S. 479, 489, and compare *Nicola* v. *Louisville & Nashville R. R.*, 14 I. C. C. 200 (4), 205.

2. But while every person who had paid the rate could

take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others. If he failed to take either of those steps and there was a finding of unreasonableness in the proceedings begun by others, he could, if in time, present his claim, and await the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented. But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that,

"all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; provided, that claims accrued prior to the passage of this act may be presented within one year." 34 Stat. 586.

In the present case the overcharges were made and paid prior to August, 1904. The present suit was brought May 9, 1909,—less than two years after the validity of the Commission's order was sustained by the Supreme Court,—but, more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose.

3. It is argued, however, that under the Conformity Act (R. S. 914), the case is to be governed by the Michigan

practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been

filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action.

4. There is the further contention that the connecting carriers operating north of the Ohio River had to collect the filed tariff rate of 30 cents per hundred, even though they were not responsible for the advance, and that in no event could they be held liable for the refund until after they had been heard by the Commission. There is nothing in this record indicating that the Commission undertook to impose a liability upon those who had not been heard. But the conclusion that the plaintiff's cause of action had been lost by lapse of time, makes it unnecessary to determine whether carriers participating in the haul,—but who did not put in the advance, or who were not parties to the proceeding in which a portion of the rate was held to be unreasonable,—could be held jointly and severally liable for the collections made by them while the 30 cent rate was in force. The suit was properly dismissed on other grounds and the judgment is

Affirmed.